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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN G. KRASNOW
RAUL R. RODRIGUEZ
National Association of Broadcasters
1771 N St., N.W.
Washington, D.C. 20036
(202) 293-3560

Attorneys for Petitioner
National Association
of Broadcasters

MICHAEL S. HORNE
DONNA M. MURASKY
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioners Hubbard Broadcasting, Inc., Midwest Television, Inc., Post-Newsweek Stations, Inc., and John Blair & Company

SAMUEL MILLER
MILLER AND FIELDS
1901 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-2700

Attorney for Petitioner Malrite T.V. of New York, Inc.

ARTHUR B. GOODKIND
KOTEEN & BURT
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-5700

Attorney for Petitioner McGraw-Hill Broadcasting Company, Inc.

JAMES A. MCKENNA, JR.
ROBERT W. COLL
STEVEN A. LERMAN
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Attorneys for Petitioner American Broadcasting Companies, Inc.

GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS INC.
51 West 52 Street
New York, New York 10019
(212) 975-4321

Attorneys for Petitioner CBS Inc.

JEROME J. SHESTACK
R. CLARK WADLOW
SCHNADER, HARRISON, SEGAL & LEWIS
1111 Nineteenth Street, N.W.
Washington, D.C. 20006
(202) 463-2900

Attorneys for Petitioner National Broadcasting Company, Inc.

J. LAURENT SCHARFF
MARK J. TAUBER
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner Association of Independent Television Stations, Inc.

LEE M. MITCHELL
TOM W. DAVIDSON
SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 624-9000

Attorneys for Petitioner Field Communications Corporation

THOMAS J. DOUGHERTY
PRESTON R. PADDEN
METROMEDIA, INC.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(202) 244-5151

Attorneys for Petitioner Metromedia, Inc.

DAVID H. LLOYD
ROBERT ALAN GARRETT
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-3600

Attorneys for Petitioner Commissioner of Baseball

PHILIP HOCHBERG
VORYS, SATER, SEYMOUR AND PEASE
1828 L Street, N.W.
Suite 1111
Washington, D.C. 20036
(202) 822-8200

Attorney for Petitioners National Basketball Association and National Hockey League

QUESTIONS PRESENTED FOR REVIEW

1. Does the Copyright Act of 1976 repeal by implication the authority the Federal Communications Commission (FCC) would otherwise have under the Communications Act of 1934 to adopt rules relating to cable television retransmission of broadcast signals which would require cable television systems to bargain competitively for the right to exhibit television programs?

2. In view of the fact that Congress enacted the Copyright Act of 1976 in light of and with reliance upon the existing FCC distant signal and syndicated program exclusivity rules for cable television, does the FCC's subsequent repeal of these rules without adoption of an alternative regulatory scheme undermine the purposes of, and therefore violate, the Copyright Act, the Communications Act or both?

3. In abruptly terminating existing contractual rights representing investments of hundreds of millions of dollars, did the agency act consistent with the prior decisions of this Court?

PARTIES TO THE PROCEEDING

The following parties are Petitioners herein and were either petitioners or intervenors aligned with petitioners in the court below: The National Association of Broadcasters; Hubbard Broadcasting, Inc.; Midwest Television, Inc.; Post-Newsweek Stations, Inc.;[i] John Blair & Company; Malrite T.V. of New York, Inc.;[ii] McGraw-Hill Broadcasting Company, Inc.;[iii] American Broadcasting Companies, Inc.; CBS Inc.; National Broadcasting Company, Inc.;[iv] Association of Independent Television Stations, Inc.; Field Communications Corporation;[v] Metromedia, Inc.; Commissioner of Baseball; National Basketball Association; and National Hockey League.

The following parties were aligned with Petitioners in the court below, but have not joined as parties to this Petition: Taft Broadcasting Company; Storer Broadcasting Company; Springfield Television Corporation; Delta Television Corp.; Evans Broadcasting Corp.; Gaylord Broadcasting Company; National Football League; Jet Broadcasting Company, Inc.; Motion Picture Association of America; Omega Communications, Inc.; Cedar Rapids Television Co.; Gilmore Broadcasting Corp.; Jefferson-Pilot Broadcasting Co.; Jefferson-Pilot Broadcasting Co.

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[i] Washington Post Co. is the parent company of Post-Newsweek Stations, Inc.

[ii] Malrite Communications Group, Inc. is the parent company of Malrite T.V. of New York, Inc.

[iii] McGraw-Hill, Inc. is the parent company of McGraw-Hill Broadcasting Company, Inc.

[iv] RCA Corporation is the parent company of National Broadcasting Company, Inc.

[v] Field Enterprises, Inc. is the parent company of Field Communications Corporation.

of Virginia; KHQ, Inc.; KTVE, Inc.; WALB-TV, Inc.; WJHG, Inc.; Bahia de San Francisco Television Co.; Forward Communications Corporation; Futura Communications Corporation; Guaranty Broadcasting Corporation; John H. Phipps Broadcasting Stations, Inc.; K-Six Television, Inc.; May Broadcasting Co.; Park Broadcasting Inc.; Plains Television Corp.; Ralph C. Wilson Industries, Inc.; Retlaw Enterprises, Inc.; Service Broadcasters, Inc.; Seven Hills Television Co., Inc.; Shamrock Broadcasting Company, Inc.; Southern Television Corp.; Spanish International Communications Corp.; Studio Broadcasting System Division of Highwood Service, Inc.; Summit Radio Corporation; Telecorpus, Inc.; WICS-TV, Inc.; Wilson Communications, Inc.; Winnebago Television Corp.; WIXT Television, Inc.; WKRG-TV, Inc.; Ziff-Davis Broadcasting Company; and Tribune Company.

Respondents to this Petition are the Federal Communications Commission and the United States of America. Aligned with Respondents in the court below were intervenors National Cable Television Association, Inc.; Community Antenna Television Association, Inc.; Allen's TV Cable Service, Inc.; United Video, Inc.; American Video Corp.; Asbury and James TV Cable Service; Audubon Electronics, Inc.; Better Cable TV; Brownwood TV Cable Service, Inc.; Cablevision of Pennsylvania, Inc.; Cass Community Antenna TV; CATV General Corporation; Central Communications Corp.; Chattanooga Cable TV Co.; Clearview Cable Corp. of South Carolina; Community Cablevision Corp.; Coosa Cable Company; Corsicana Cable TV Co.; Daniels Properties, Inc.; Dorate, Inc.; Greater Media, Inc.; Harmon and Company; Hawaiian Cable Vision Corp.; Hill City Cable TV Company; Hurley Cable TV, Inc.; Intertie, Inc.; Lakeview TV, Inc.; Landmark Cablevision As-

sociates; Lynn County CATV, Inc.; Maine Cable Television, Inc.; McDonald Group, Inc.; Pearson Cable TV Antenna System, Inc.; Piggott Video Cable, Inc.; Pinebelt Cablevision, Inc.; Rockford Cablevision, Inc.; Schuylkill Valley Trans-Video Corp.; Shen-Heights TV Associates, Inc.; Snyder Community Antenna Television, Inc.; Sweetwater Television Co.; Telecommunications, Inc.; Television Enterprises, Inc.; Tele-View, Inc.; TOCOM, Inc.; Total Television, Ltd.; Transcable, Inc.; Twin County Trans-Video, Inc.; UA-Columbia Cablevision, Inc.; United Cable Television Corporation; Valley Antenna Systems, Inc.; Vandalia Cable TV Co., Inc.; and Wood River Cable-Vision, Inc.

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OPINIONS BELOW

The Report and Order of the Federal Communications Commission, reported as *Report and Order in Docket Nos. 20988 and 21284,* 79 F.C.C.2d 652 (1980), is reproduced in the Supplemental Appendix. The opinion of the Court of Appeals, reported at ____ F.2d ____ (2d Cir. 1981), is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutory provisions — Sections 111(c) and (d), 301 and 801(b) of the Copyright Act of 1976, and Sections 1, 303, 307, 325 and 330 of the Communications Act — are set out in Appendix A. The agency regulations repealed by the FCC's decision are set out in Appendix B.

STATEMENT OF THE CASE

1. *Introduction*

This case poses fundamental issues regarding the authority of the FCC to adopt rules regulating the competitive relationship between two multi-billion dollar industries, cable television and television broadcasting, the "principal source of information and entertainment for a great part of the Nation's population." *United States* v. *Southwestern Cable Co.*, 392 U.S 157, 177 (1968).

Petitioners seek review of a judgment of the United States Court of Appeals for the Second Circuit upholding a decision by a four member majority of the FCC that constitutes, in the words of the lower court, "a major reversal of its regulatory policy. . . ." App. C at 2c. That reversal repeals longstanding agency rules regulating the retransmissions by cable television systems of programming broadcast by television stations. *Report and Order in Docket Nos. 20988 and 21284*, 79 F.C.C.2d 652 (1980) (*"Report"*).[1]

The rules in question are commonly known as the "syndicated program exclusivity" and "distant signal" rules. The former, 47 C.F.R. §§ 76.151-76.161 (1980), allowed local television broadcast stations to insure that

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[1] The *Report* followed an informal, notice-and-comment rulemaking proceeding initiated by a *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284*, 71 F.C.C.2d 1004 (1979) (*"1979 Notice"*). Previously, the agency conducted two separate inquiries resulting in two FCC staff reports that were the predicate for the consolidated rulemaking proceeding. *Notice of Inquiry in Docket No. 20988*, 61 F.C.C.2d 746 (1976); *Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977); *Report in Docket No. 20988*, 71 F.C.C.2d 951 (1979); *Report in Docket No. 21284*, 71 F.C.C.2d 632 (1979).

cable systems did not import from "distant" stations broadcasts of syndicated programs when local stations had purchased exclusive television exhibition rights to those programs.[2] The latter, 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), & 76.63 (1980), limited the number of signals from distant stations that a cable system could retransmit to its subscribers.[3]

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[2] So-called "syndicated programming" consists of recorded television programs distributed by independent producers or distributors for broadcast by different television stations in different areas or "television markets" throughout the country at such times and with (or without) such commercial sponsorship as each local station may arrange for its broadcasts. It is thus different from "local programming" produced by the station which broadcasts it, from "network programming," which is distributed for simultaneous broadcast by a number of stations by a single originator (such as ABC, CBS or NBC) that typically obtains all or most of the commercial sponsorship, and from "live" programming such as broadcasts of sports contests. Programs sold on a syndicated basis may have been especially created for that purpose or they may consist of feature films or series programs previously broadcast on a network basis.

[3] Both the FCC's rules and the Copyright Act of 1976 employ the concepts of "local" and "distant" signals. In general, the signal of any given broadcast station is "local" where viewers can, and do, obtain sight and sound of reasonable quality on their home receivers without the amplification or modification provided by a cable system, and it is "distant" where this is not the case.

Television broadcast stations send out signals in a generally omnidirectional pattern. Beyond a certain distance (typically 60 miles) it becomes difficult or impossible to receive any given station's signal, unless it is retransmitted on another frequency. This limitation results in part from FCC requirements designed to avoid mutually destructive interference between stations and to ensure an optimum number of stations.

The Court of Appeals indicated (App. C at 10c), erroneously, that local stations consist only of those within 35 miles of the community of a cable system. In fact, stations considerably farther away frequently meet one or more of the criteria for treatment as local stations.

Without such FCC rules, cable television systems (unlike *any* other competing program exhibitor) may exploit for their own profit unlimited quantities of programs originated by television broadcast stations without bargaining for the right to use such programs, and even though local broadcast stations have purchased exhibition rights in the expectation that they could operate as the exclusive outlet for the particular programs for limited periods of time.

2. *The Unique Relationship Between Cable Television Systems and Television Broadcast Stations.*

Stations produce some of the programs broadcast ("local" programming), obtain others from networks if they have a network affiliation, and buy exhibition rights to still other programs from various distributors or syndicators.[4] Like other program exhibitors such as pay cable entrepreneurs and theatres, broadcast stations seek to maximize their audiences by, *inter alia,* investing in expensive, popular programs and by extensive efforts to promote the popularity of their programs. To ensure that the benefit of such efforts does not redound to competitors, broadcast stations (again like other exhibitors) acquire exclusive exhibition rights for programs within their respective service areas for limited periods of time.

Such exclusivity is made possible both by copyright law and by Section 325(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 325(a) (1976), which prohibits one station from rebroadcasting the signal of an-

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[4] A network affiliate typically obtains some 60% of its programming from its network; much of the balance consists of syndicated programming. Independent stations (those which do not have a network affiliation) have an even greater dependence on syndicated programming.

other without the latter's consent. When buying syndicated programming, for example, stations contract for exclusive exhibition rights within their respective service areas or markets. Stations in other markets cannot simply rebroadcast the signal (and programs) of the first buyer without a copyright license from the program seller or without rebroadcast consent from the first station pursuant to Section 325(a), and authority to give such consent can be the subject of negotiation and contract between the program seller and the first station.

In contrast, cable television systems operate completely outside the competitive marketplace created by Section 325 and the Copyright Act insofar as they are engaged in the retransmission of broadcast signals. Thus a Washington area cable system can and will impair or destroy the exclusivity which, for example, a Washington, D.C. station buys, by importing the signals of stations originating in New York, Chicago and Atlanta that have purchased the same programs as the Washington station has purchased.[5]

3. *Prior Regulatory Aspects of Broadcast/Cable Relationship*

In the mid-1960s the FCC began to regulate cable use of broadcast signals. Three principal considerations led the FCC to do so. *First,* since cable is available only to those who can afford to pay for it, any diminution that cable might cause in the quantity or quality of broadcast

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[5] Cable systems not only retransmit the signals of local and distant broadcast stations but also distribute programming originated specifically and exclusively for cable viewers. This programming, which often is available only for an additional fee and is referred to as "pay cable," must, under the copyright laws, be purchased in the competitive marketplace and the propriety of such competition is not at issue here.

service would reduce the television service that otherwise would be available to the economically disadvantaged or to those persons living in areas which are not served by cable television. *Second,* unlike other competing video technologies (including pay cable), cable retransmission of broadcast signals has historically occurred outside the normal marketplace for the acquisition of program exhibition rights. Without either normal copyright liability or FCC regulations imposing obligations comparable to Section 325(a), cable systems can retransmit (without consent from the program supplier or broadcast station) programs from one market to another, thereby frustrating the normal program distribution pattern and impairing local exclusive exhibition rights.[6] *Third,* by distributing broadcast signals from a few large cities to smaller communities throughout the country, cable undercuts the FCC policy of maximizing service from local broadcast outlets.[7]

After extensive rulemaking proceedings, the FCC concluded that it had and should exercise authority under

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[6] As the FCC has put it:

> This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product — the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all. *First Report and Order in Docket Nos. 14895 and 15233,* 38 F.C.C. 683, 704 (1965).

As the court below conceded, "while the broadcasting industry [has] spent billions of dollars to create and purchase programming, cable operators [have been] able to retransmit those programs at their operating cost without making any payment to program suppliers." App. C at 12c.

[7] The FCC is charged with ensuring "the fair, efficient, and equitable" allocation of broadcast service among the various states and communities. 47 U.S.C. § 307(b) (1976).

the Communications Act to regulate cable use of broadcast signals. *Second Report and Order in Docket Nos. 14895 and 15233,* 2 F.C.C.2d 725 (1966). This Court, in upholding the FCC's assertion of jurisdiction, ruled that the FCC was vested with the power to regulate any service "reasonably ancillary" to the Commission's primary statutory responsibilities. *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 177 (1968).

Among other things, the rules precipitating the *Southwestern Cable* decision prohibited any distant signal importation into the 100 largest television markets except upon a showing in an evidentiary hearing of consistency with the public interest. *Second Report and Order, supra,* 2 F.C.C.2d at 782. In late 1968, finding this *ad hoc* approach too cumbersome, the FCC proposed adoption of a retransmission consent requirement for CATV use of distant signals similar to the rebroadcast consent requirement of Section 325(a); thereafter, the FCC expanded the rulemaking proceeding with alternative proposals to allow CATV importation of specified numbers and types of distant signals.[8] The rule making resulted in comprehensive new rules adopted in 1972. *Cable Television Report and Order,* 36 F.C.C.2d 143, *reconsid. granted in part, Memorandum Opinion and Order,* 36 F.C.C.2d 326 (1972) ("*CTRO*" and "*CTRO Reconsidered,*" respectively). These rules were designed to permit enough distant signal importation to stimulate the growth and development of cable in larger markets but not so much as might impair the quality and quantity of local, free broad-

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[8] *Notice of Proposed Rule Making* and *Notice of Inquiry in Docket No. 18397,* 15 F.C.C.2d 417 (1968); *Second Further Notice of Proposed Rule Making in Docket No. 18397-A,* 24 F.C.C.2d 580 (1970).

cast service. As the FCC put it, the distant signal carriage rules represented its determination as to

> (a) the amount of distant signal competition that can be introduced into particular types of markets without having adverse local television service, and (b) the effect of distant signal carriage on the supply of television programming.

CTRO, supra, 36 F.C.C.2d at 168.[9]

Concurrently, Congress was attempting to address the appropriate interface of CATV and broadcasting, principally by means of proposed copyright legislation. Although the question remained in doubt for a long period, this Court ultimately held that cable retransmission of both local and distant broadcast signals did not constitute a public "performance" within the meaning of the 1909 Copyright Act. *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974). As a result, in the absence of FCC regulatory measures, cable systems were free to retransmit local and distant signals without operating within the normal restraints of the competitive marketplace.

Prior to the FCC's 1972 decision, throughout the long period in which Congress considered a general revision

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[9] Within 35-mile zones around local stations, cable systems were authorized to carry from one to three distant independent stations (depending on the size of the market), subject to compliance with rules relating to syndicated programming. The syndicated exclusivity rules, in turn, were "designed both to protect local broadcasters and to insure the continued supply of television programming," and were described as "fundamental to the continued functioning of broadcast and cable television alike." *Id.* at 169. Generally they required CATV systems within the 35-mile zones to delete from distant signals those programs for which the local station had purchased exclusive exhibition rights.

of the 1909 Copyright Act, various bills contemplated a limited compulsory copyright license for cable television — one containing important statutory exceptions designed to ensure that exclusive exhibition rights sold to broadcasters would not be significantly impaired by cable importation of distant signals. *See, e.g.*, S. Rep. No. 1219, 91st Cong., 2d Sess. 8-9 (1970). However, the FCC's 1972 initiative of adopting program exclusivity measures was intended to relieve Congress of the need to address exclusivity issues in the copyright legislation, thus facilitating passage of the long delayed modernization of the 1909 Act.[10]

Thus, the copyright legislation that finally emerged, the Copyright Act of 1976, Pub. L. No. 94-553, 17 U.S.C. §101 *et seq.* (Supp. III 1979), (1) defined any cable retransmission of a broadcast signal as a performance of a copyrighted work (17 U.S.C. §106), (2) created a compulsory licensing mechanism, requiring modest, noncompensatory payments for distant signal programming carried by cable systems (17 U.S.C. §111), and (3) confined the scope of that compulsory license to local signals and to distant signals only to the extent that such distant signal carriage "is permissible under the rules, regulations, or authorization of the Federal Communications Commission." (17 U.S.C. §111(c)(1)).

4. *The FCC's Decision to Repeal the Rules.*

Shortly after passage of the new Copyright Act, the FCC initiated new inquiries to review the syndicated program exclusivity rules (*Notice of Inquiry in Docket No.*

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[10] *CTRO, supra*, Appendices C and E, 36 F.C.C.2d at 261 and 286. *See also, CTRO Reconsidered, supra*, 36 F.C.C.2d at 328. Such legislation finally passed in 1976, effective for the most part on January 1, 1978.

20988, 61 F.C.C.2d 746 (1976)), and the distant signal carriage rules (*Notice of Inquiry in Docket No. 21284*, 65 F.C.C.2d 9 (1977)). These inquiries were followed by the institution of an informal rulemaking proceeding in 1979. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284*, 71 F.C.C.2d 1004 (1979). In July, 1980, by a four to three vote, the FCC adopted the *Report* repealing both the syndicated program exclusivity and distant signal carriage rules. As a result, the scope of the compulsory license available under the Copyright Act became unlimited. Further, exclusive exhibition rights to particular programs or series of programs for which broadcasters had bargained and paid hundreds of millions of dollars were rendered meaningless insofar as cable retransmissions are concerned.

The veritable mountain of paper generated by the agency to rationalize the majority's decision amounts to this: Repeal is not likely, in the near future, to have a devastating impact on the quality and quantity of free broadcast television service. Notwithstanding the submission of evidence compiled by numerous parties that the repeal would skew the marketplace, the FCC determined that no such devastating injury would occur.[11] The Commission concluded that the public interest would best be served by allowing maximum "competition" between cable and broadcasting.

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[11] The FCC conceded that "[c]ertainly, the evidence demonstrates that local broadcast stations will earn less revenues and profits if distant signals are authorized than they otherwise would have. . . ." (*Report* at ¶189), but predicted that audience fragmentation with resulting loss of revenue was likely to be "only" an average of approximately ten percent, and thus would not significantly adversely affect existing levels of service provided by broadcasters. *Id.* at ¶191. With respect to the syndicated exclusivity rules, the FCC majority stated that their elimination was not likely to have much greater impact than elimination of the distant signal rules.

Numerous parties before the FCC pointed out that, without any regulation, the result would be far from normal or rational marketplace competition. With an unlimited compulsory copyright license, cable would enjoy an enormous competitive advantage over broadcast stations. To avoid such a skewed marketplace, the National Telecommunications and Information Administration of the United States Department of Commerce (NTIA) proposed that cable systems be required to obtain consent from the originating broadcast station before retransmitting nonnetwork programming to their subscribers. Ultimately the FCC rejected this and similar proposals solely on the ground that the 1976 Copyright Act robbed the FCC of jurisdiction under the Communications Act to adopt any such requirement.[12]

The agency majority also concluded that the FCC had no obligation under either statute to regulate cable television for so-called "copyright" purposes.

The Court of Appeals affirmed.

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[12] In the court below FCC counsel contended that the agency also had independently rejected the retransmission consent proposals on policy grounds. The lower court, however, concluded that the FCC's construction of the Copyright Act was the decisive issue, and went on to uphold the agency's preemptive interpretation of the Copyright Act. *See* App. C at 19c-25c.

REASONS FOR GRANTING THE WRIT

I. The Lower Court's Holding That The Copyright Act Of 1976 Prohibits The FCC From Adopting Mechanisms Such As Retransmission Consent Pursuant To Its Authority Under The Communications Act Is Inconsistent With Prior Decisions Of This Court And Improperly Impairs The Ability Of The FCC To Fulfill Its Broad Responsibilities Under The Communications Act.

The claim sustained by the lower court that the Copyright Act of 1976 repealed by implication some of the FCC's powers under the Communications Act conflicts with repeated decisions of this Court rejecting the notion of repeals by implication. *See, e.g., Nader* v. *Allegheny Airlines,* 426 U.S. 290, 298 (1976); *FAA* v. *Robertson,* 422 U.S. 255, 266 (1975). Ordinarily, courts should not infer withdrawal of the jurisdiction of an agency, conferred by a prior legislative enactment, "absent a clearly expressed congressional intention." *FAA* v. *Robertson, supra,* at 266. Here, there is no such "clearly expressed congressional intention" in either the language of the Copyright Act or its legislative history.[13] Indeed, the relevant evidence of congressional intent points to just the opposite conclusion: the new Copyright Act leaves the FCC free to regulate the circumstances in which cable systems may retransmit distant broadcast signals so long as broadcast stations and their program suppliers are not deprived of

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[13] The fact that Congress rejected full copyright liability for cable systems for *all* broadcast signals, local and distant, does not suggest otherwise. Among other matters, given the fact that substantial numbers of cable systems already had been operating with complete immunity from copyright liability for many years, full copyright liability reasonably could have been viewed as too disruptive. Thus, at the time it was felt that until and unless mechanisms for obtaining copyright clearances were created, existing cable systems might have had to cease operations completely. In contrast, a retransmission requirement could apply only to programs and signals that cable systems had previously been barred from retransmitting.

the minimal rights established by the Copyright Act itself.

Section 111(c) of the Copyright Act, 17 U.S.C. §111(c)(1) (Supp. III 1979), provides in pertinent part:

> [a] secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission . . . and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) *where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.* (emphasis added)

On its face, the Act provides that only cable retransmissions "permissible under the rules, regulations, or authorizations of the Federal Communications Commission" receive a compulsory license. The FCC's authority to prohibit *any* secondary transmissions of distant stations, thereby imposing, in effect, full copyright liability for such transmissions, is preserved. Furthermore, with a single possible exception,[14] the Copyright Act does not preclude the Commission from adopting rules patterned on Section 325 of the Communications Act.[15] The compulsory licensing scheme comes into play only after the FCC permits retransmission, on such terms and subject to such conditions or limitations as deemed to be appropriate under the Communications Act. Accordingly, the Copyright Act is properly viewed

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[14] At least in the absence of a copyright license from the program owner, the FCC may not permit cable retransmission without payment of at least the nominal statutory royalty imposed by the Copyright Act. 17 U.S.C. §111(c).

[15] To the contrary, the Act places affirmative obligations on the FCC to implement the regulatory scheme intended by the delicate balance constructed by Congress.

as establishing a floor below which the FCC may not go in sanctioning cable retransmission but in no way as establishing a ceiling.

The lower court expressed incredulity at the notion that, "in an era of compulsory copyright licensing, . . . Congress intended its formula for [cable television] royalty fees to be only a minimum subject to FCC alteration, since it delegated broad discretionary authority to the [Copyright Royalty] Tribunal, and not the FCC, to readjust the rates if regulatory action so required." App. C at 24c. This so-called "era" involves three other, and relatively minor, compulsory licensing exceptions to the general statutory scheme. *See* App. C at 44c. But more fundamentally, the NTIA and other similar proposals did not call upon the FCC to assume the role of yet another governmental body setting rates or fees for private transactions. Rather than seeking any such further governmental interference with the normal competitive marketplace, they called upon the FCC to exercise its plenary authority under the Communications Act to create an environment in which both broadcasting and cable could compete on equal terms.

Other provisions of the 1976 Copyright Act also are in conflict with the Court of Appeals action here. Most importantly, Section 301, characterized by the legislative history as "one of the bedrock provisions of the bill" (S. Rep. No. 473, 94th Cong., 1st Sess. 112 (1974)), explicitly provides that "[n]othing in this title annuls or limits any rights or remedies under any other federal statute." 17 U.S.C. § 301(d) (Supp. III 1979). This savings clause stands in marked contrast to the savings clauses in many other statutes. Here, Congress specifically differentiated between the types of regulations that the statute is intended to preempt, § 301(a) (state and local regulation), and the type of regulations not preempted, § 301(d) (federal statutes).

Yet, the lower court, in holding that the FCC "is not free to adopt a new [regulatory approach] . . . that would be inconsistent with a basic arrangement of the new legislation," (App. C at 23c), totally ignored Section 301(d) and unfairly disparaged as mere "glimmerings" other legislative history demonstrating that the court was wrong.

This Court has explained that under the Communications Act the FCC is "expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable or radio.'" *United States* v. *Southwestern Cable Co., supra,* at 168. Thus, in the Communications Act, Congress "gave the Commission 'a comprehensive mandate,' with not 'niggardly but expansive powers.'" *Id.* at 173, *quoting National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). Moreover, the FCC's jurisdiction is "not just as a matter of avoidance of adverse effects, but extends also to requiring CATV affirmatively to further statutory policies," *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 664 (1972) (*"Midwest Video I"*) (plurality opinion). To hold otherwise is "inconsistent with" this Court's "recognition in *Southwestern* 'that it was precisely because Congress wished to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission . . . that it conferred upon the Commission a unified jurisdiction and broad authority.'" *Id.* at 665 (footnotes omitted).[16]

The decision below violates yet another accepted principle of statutory construction. This Court has made

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[16] Following *Midwest Video I*, an FCC prohibition of state and local regulation of rates charged for pay cable was upheld because "the FCC may regulate cable TV if its regulation will further a goal which

clear that repeals of a pre-existing right, such as the FCC's authority to impose retransmission consent, should not be implied "'unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.'" *Nader* v. *Allegheny Airlines, supra,* at 298, *citing Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 437 (1970). Here, there is no such repugnancy. The FCC's adoption of rules to expand or contract the scope of the statutory compulsory license is not repugnant to the Copyright Act, so long as the statutory mechanism for adjusting royalty rates can adequately take account of the change. Here, the statutory royalty mechanism can be adequately adjusted to take account of the effects of the NTIA's retransmission consent proposal. Because these statutes are "'capable of coexistence, it'" was "'the duty of the'" court below, "'absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *FAA* v. *Robertson, supra,* at 266, *citing Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133-34 (1974). *See Morton* v. *Mancari,* 417 U.S. 535, 551 (1974).

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it is entitled to pursue in the broadcast area." *Brookhaven Cable TV, Inc.* v. *Kelly,* 573 F.2d 765, 767 (2d Cir. 1978), *cert. denied,* 441 U.S 904 (1979).

The FCC is not only entitled but required by Section 325 to ensure that stations do not use the programs of other stations without obtaining consent. It cannot shirk this duty on the theory that Section 325 is redundant of the requirements of the copyright law. Thus, the FCC may likewise require cable systems to obtain retransmission consent before using the signal of a broadcast station, as a matter of communications policy, consistent with both the Communications Act and the Copyright Act. *See also FCC* v. *Midwest Video Corp.,* 440 U.S. 689, 699-700 (1979).

The Copyright Act does not repeal by implication or otherwise the FCC's authority to regulate cable for purposes comparable to those reflected in Section 325 of the Communications Act.

II. The FCC's Repeal Is Contrary To The Copyright Act And The Communications Act.

A. The lower court's decision contravenes the congressional intent underlying the copyright law.

The rescission of the syndicated program exclusivity and distant signal rules destroys the delicate balance contemplated by Congress between allowing copyright owners the maximum opportunity to market their programs in accordance with their own perception of their best interests, and the desire to avoid disrupting a then fairly small cable television industry which had theretofore escaped the responsibility of bargaining for program exhibition rights. Those conflicting goals resulted in the adoption of a statutory compulsory license limited to the programs made available to cable under a comprehensive FCC regulatory scheme designed in large part to further the interests of copyright owners as well as the broader public interest. By simply repealing its rules, and by abdicating any responsibility for the creation and maintenance of a rational marketplace, the FCC destroyed the predicate for the compulsory license. The critical point is that Congress acted against the backdrop of the then-existing FCC rules, and in light of FCC representations that fundamental changes in the rules and its regulatory policies regarding cable television were *not* contemplated.[17]

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[17] *See, e.g.*, 119 Cong. Rec. 9389 (1973) (remarks of Senator McClellan explaining that statutory limitations on the scope of the compulsory license were no longer necessary in view of the FCC's

By ignoring this point, and by reading other legislative history through the proverbial looking-glass, the lower court disparaged the 1972 distant signal rules as mere "proxies" and "surrogates" for statutory copyright which were rendered superfluous by the 1976 legislation. App. C at 13c, 14c.

But in adopting the 1976 Copyright Act, Congress made clear that it was not inviting FCC abdication of regulatory responsibility:

> We . . . caution the Federal Communications Commission . . . not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals. These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. at 89 (1976).[18]

1972 rules); S. Rep. No. 93-983, 93rd Cong., 2d Sess. 132 (1974) (statutory restrictions on compulsory licensing for cable retransmission of sports broadcasts unnecessary in view of FCC representations that it would deal with the problem through its regulatory powers under the Communications Act); H. Rep. No. 94-1476, 94th Cong., 2d Sess. 176 (1976) (open-ended compulsory license is acceptable because FCC's syndicated exclusivity rules protect the interests of program suppliers).

[18] Besides disparaging these words as mere "glimmerings of legislative history," the lower court speculates that they possibly reflect only "concern for congressional etiquette among the several committees with overlapping jurisdiction over the regulated subject matter. . . ." App. C. at 20c, 22c. None of this is consistent with this Court's standards for statutory construction.

To be sure, Congress did not "freeze" the scope of the compulsory license to encompass no more (or less) than was permissible under the FCC rules at any given moment.[19] The possibility of *some* increase in the number of distant signals available under the FCC's syndicated exclusivity and sports rules that might increase *or* decrease the broadcast programs available to cable under FCC rules. The Copyright Royalty Tribunal ("CRT") was authorized to make some adjustments in royalty rates in the event of such occurrences. 17 U.S.C. § 801(b)(2)(B) and (C) (Supp. III 1979). But this envisioning of some fine tuning of FCC regulations is not the same as expecting or condoning total abdication of FCC regulatory responsibility. And Congress clearly did not contemplate the FCC abdication reflected in the agency's *Report* in this case. As Robert E. Lee, senior member of the FCC, put it in his dissent to the *Report:*

> The CATV system takes the programming without participation in the marketplace and without any regard for the contractual rights of those who have participated. It uses this programming for its own profit.

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[19] The amount of the statutory royalty fee varies with the number of distant signals (or, more accurately, the number of "distant signal equivalents") carried by a cable system, but any number of local stations may be carried without affecting the amount of the fee. *See* 17 U.S.C. §111(d) (2) (B). If Congress had contemplated or intended to sanction drastic revisions in the FCC's rules, it presumably would not have been concerned with a new FCC rule that declared all stations to be "local" throughout the entire country, and thus available subject only to the payment of the minimum fee. But in fact for copyright purposes the Congress chose to freeze the FCC definition of a local signal as of April 15, 1976. *See* 17 U.S.C. §111(f). This and other aspects of the statute belie any intent to condone what the FCC opted to do in its 1980 *Report.*

> I recognize that copyright legislation is supposed to be the solution for this problem. With syndicated exclusivity protection in our rules, it may be. As one who lived through the "Consensus Agreement," the development of our 1972 rules, and the Copyright Act, *I can assure my colleagues that maintaining syndicated exclusivity was the understanding of all of the participants. It was one of the premises of the copyright legislation.*

Report, at p. 892 (emphasis added).[20]

Moreover, at the very time that the FCC was considering repeal of the rules at issue here, Representative Kastenmeier, for many years Chairman of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, and the congressman who led the initiative to modernize the Copyright Act of 1909, warned that Congress envisioned no such change in 1976:

> The announced intention of the Commission to deregulate the cable industry is particularly of interest because we did not contemplate such a sweeping change in the regulatory structure when we drafted [the 1976 Copyright Act].

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[20] Still more recently the former Register of Copyrights echoed this sentiment:

> "In 1976 it was generally, if not universally, assumed that the FCC might tinker with its rules, and that if it did so the Copyright Royalty Tribunal could restore the proper balance by adjustments in the statutory royalty rates. It was not anticipated that the FCC would completely abandon the protection it offered copyright owners, and I believe that this change is too great to be appropriately and effectively redressed in CRT proceedings." Statement of Barbara Ringer, Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice Committee on the Judiciary, U.S. House of Representatives, at 6 (June 25, 1981).

> There is little doubt that the 1976 Copyright Act was written against the backdrop of existing communications law and regulations. *There is also little doubt that it is impossible to completely separate copyright law and communication policy as the Copyright Act of 1976 is now written.* Letter from Representative Kastenmeier to the Honorable Charles Ferris, Chairman, FCC (March 13, 1980) (emphasis added).

In short, instead of being mere "glimmerings" of congressional intent, as characterized by the lower court, the legislative history of the 1976 Copyright Act clearly does not render the FCC's 1972 rules obsolete "surrogates" or "proxies" for the new statute. Rather, the legislative history stands for the proposition that continuation of those rules, or creation of an appropriate substitute aimed at effectuating the same basic policies, was essential to achievement of the statutory scheme. For that reason alone, this Court should grant this petition.

B. The lower court's decision adopts a narrow view of the FCC's responsibilities under the Communications Act which is inconsistent with prior decisions of this court.

Section 1 of the Communications Act of 1934, as amended, states that the FCC's purpose is "to make available, so far as possible, *to all the people of the United States,* a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. §151 (1976) (emphasis added).[21] The FCC's statutory duty is to ensure that the best practicable broadcast service will be provided to *all* the public "and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g) (1976)

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[21] In its cursory review of the "FCC's statutory directives," App. C at 30c, the lower court simply ignored the words emphasized in the text above.

This Court has held that these statutory provisions manifest a congressional intent to encourage and facilitate the development of a universally available, free, locally-oriented, over-the-air broadcasting system. Thus, in *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), this Court explained that "the avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *Id.* at 217. Subsequently, in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court underscored the Commission's "broad responsibilities for the orderly development of an appropriate system of *local television broadcasting*," *id.* at 177 (emphasis added), and ruled that the Commission had jurisdiction over cable, to the extent "reasonably ancillary" to the effectuation of the Commission's primary statutory responsibility of ensuring the development of, and service by, the free broadcasting system.

Simple repeal of the distant signal and syndicated exclusivity rules, without substitution of some mechanism that would permit a normal marketplace to function, prevents broadcast stations from providing the public with the best possible service. Inevitably some program suppliers, faced with a choice of selling their wares to pay cable entrepreneurs, where exclusivity can be sold, or to conventional broadcast stations, where exclusive exhibition rights *vis-à-vis* cable retransmissions are precluded, will opt for the non-broadcast service for those reasons alone. Major sports interests have already explained that simple repeal of the cable television rules renders the broadcast medium far less attractive than it otherwise would be for the exhibition of sports contests. *Report* at ¶ 265

It was only by viewing its responsibility under the Communications Act as merely one of prevention of

devastating impact, and by attempting to blame Congress and the Copyright Act of 1976 for the anomaly created by simple repeal, that the FCC majority and the lower court were able to justify the agency's decision.

III. The Lower Court's Rationalization For The Agency's Failure To Phase Out The Existing Rules In An Orderly Manner Is Inconsistent With The Prior Decisions Of This Court.

The lower court rationalized the agency's termination of existing exclusivity rights, for which millions of dollars have been expended, on the basis of a Fifth Circuit case holding that the FCC need not create "grandfather rights" in perpetuity. *See* App. C at 31c-32c. But that was not the issue. Existing program contracts will expire by their own terms over a period of years. Many if not all of the pre-1979 contracts were negotiated and executed in the expectation that broadcast stations would be entitled to exclusivity *vis-à-vis* cable retransmissions of the same programs.[22]

This Court and others have repeatedly held that administrative agencies may and should take existing equities into account in modifying their rules. *E.g., FTC* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *Beneficial Corp.* v. *FTC*, 542 F.2d 611, 620 (3d Cir. 1976), *cert. denied* 430 U.S. 983 (1977); *City of Chicago* v. *FPC*, 385 F.2d 629, 637 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *National Association of Independent Television Producers and Distributors* v. *FCC*, 502 F.2d 249, 253-54 (2d Cir. 1974) (requiring the FCC to delay implementation

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[22] The Commission had suggested that existing exhibition rights would be "grandfathered." *1979 Notice, supra*, at 1027. That notion, however, was later rejected in the *Report*, at ¶¶ 237-240.

of changes in existing rules on the basis of which independent program producers had made substantial investments). The appropriateness of tailoring changes in policy to minimize disruption of prior expectations is no longer open to serious question. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). The lower court simply ignored these considerations.

CONCLUSION

In *United States* v. *Southwestern Cable Co., supra*, this Court observed that:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems.

392 U.S. at 177.

In the intervening 13 years the significance of the television medium to the public has greatly increased. By the narrowest of possible votes, the FCC has adopted a fundamental change in agency policy that may well lead to significant changes in the structure and composition of television service to the public. That fundamental change in agency policy was upheld by the lower court on the basis of an unprecedented and clearly erroneous interpretation of the Copyright Act of 1976 and its interrelationship with the Communications Act of 1934. Plenary review of these important federal statutory issues by this Court is fully warranted.

Respectfully submitted,

ERWIN G. KRASNOW
RAUL R. RODRIGUEZ
National Association of Broadcasters
1771 N St., N.W.
Washington, D.C. 20036
(202) 293-3560

Attorneys for Petitioner
National Association of
Broadcasters

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APPENDIX A

Relevant Statutes

Excerpts from the Copyright Revision Law of 1976

Sec. 111(c) [17 U.S.C. 111(c)] Secondary Transmissions by Cable Systems.--

(1) Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a

work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work iw actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections

502 through 506 and 509, in the following cases:

> (A) where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission; or
>
> (B) where the cable system has not recorded the notice specified by subsection (d) and deposited the statement of account and royalty fee required by subsection (d).

(3) Notwithstanding the provisions of clause (1) of this subsection and subject to the provisions of subsection (c) of

this section, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if the content of the particular program in which the performance or display is embodied, or any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, is in any way willfully altered by the cable system through changes, deletions, or additions, except for the alteration, deletion, or substitution of commercial advertise-

ments performed by those engaged in television commercial advertising market research: *Provided*, That the research company has obtained the prior consent of the advertiser who has purchased the original commercial advertisement, the television station broadcasting that commercial advertisement, and the cable system performing the secondary transmissions: *And provided further*, That such commercial alteration, deletion, or substitution is not performed for the purpose of deriving income from the sale of that commercial line.

(4) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by an appropriate governmental authority of

Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and section 509, if (A) with respect to Canadian signals, the community of the cable system is located more than 150 miles from the United States-Canadian border and is also located south of the forty-second parallel of latitude, or (B) with respect to Mexican signals, the secondary transmission is made by a cable system which received the primary transmission by means other than direct interception of a free space radio wave emitted by such broadcast television station, unless prior to April 15, 1976, such cable system was actually carrying, or was specifically authorized to carry, the signal of such foreign station on the system pursuant to the rules,

regulations, or authorizations of the Federal Communications Commission.

Sec. 111(d) [17 U.S.C. § 111(d)] Compulsory License for Secondary Transmissions by Cable Systems. --

(1) For any secondary transmission to be subject to sompulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who

owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted) shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright

Royalty Tribunal (if and when the Tribunal has been consituted), prescribe by regulation --

> (A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after consultation with the

Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programing of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against

the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and in computing the amounts payable under paragraph (ii) through (iv),above, any fraction of a distant signal equivalent shall be computed at its

fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for basic service or providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by

subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable

under this subclause shall be (i) 0.5 of 1 per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as

provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose word was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local

service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existance of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsec-

tion, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

Sec. 301 [17 U.S.C. § 301]. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created

before ar after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

* * *

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

Sec. 801 (b) [17 U.S.C. § 801(b)] Subject to the provisions of this chapter, the purposes of the [Copyright Royalty] Tribunal shall be --

* * *

(2) to make determinations concerning the adjustment of the copyright royalty rates in section 111 solely in accordance with the following provisions:

(A) The rates established by section 111(d) (2)(B) may be adjusted to reflect (i) national monetary inflation or deflation or (ii) changes in the average rates charged cable subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar level of the royalty fee per subscriber which existed as of the date of enactment of this Act: *Provided*, That if the average rates charged cable subscribers for the basic service of providing secondary transmissions are changed so that the

average rates exceed national monetary inflation, no change in the rates established by section 111(d)(2)(B) shall be permitted; *And provided further,* That no increase in the royalty fee shall be permitted based on any reduction in the average number of distant signal equivalents per subscriber. The Commission [sic] may consider all factors relating to the maintenance of such level of payments including, as an extenuating factor, whether the cable industry has been restrained by subscriber rate regulating authorities from increasing the rates for the basic service of providing secondary transmissions.

(B) In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit the carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by section 111(d)(2)(B) may be adjusted to insure that the rates for the additional distant signal equivalents resulting from such carriage are reasonable in the light of the changes effected by the amendment to such rules and regulations. In determining the reasonableness of rates proposed following an amendment of Federal Communications Commission

rules and regulations, the Copyright Royalty Tribunal shall consider, among other factors, the economic impact on copyright owners and users: *Provided*, That no adjustment in royalty rates shall be made under this subclause with respect to any distant signal equivalent or fraction thereof represented by (i) carriage of any signal permitted under the rules and regulations of the Federal Communications Commission in effect on April 15, 1976, or the carriage of a signal of the same type (that is, independent, network, or noncommercial educational) substituted for such permitted signal, or (ii) a television broadcast signal first carried after April 15, 1976,

pursuant to an individual waiver of the rules and regulations of the Federal Communications Commission, as such rules and regulations were in effect on April 15, 1976.

(C) In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television

broadcast signals carried on those systems affected by the change.

(D) The gross receipts limitations established by section 111 (d)(2)(C) and (D) shall be adjusted to reflect national monetary inflation or deflation or changes in the average rates charged cable system subscribers for the basic service of providing secondary transmissions to maintain the real constant dollar value of the exemption provided by such section; and the royalty rate specified therein shall not be subject to adjustment; and

(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116, and to deter-

mine, in cases where controversy exists, the distribution of such fees.

Excerpts from the Communications Act of 1934, as Amended

Sec. 1. [47 U.S.C. § 151] For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted

by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commissio " which shall be constituted as hereina.ter provided, and which shall execute and enforce the provisions of this Act.

Sec. 303. [47 U.S.C. § 303] Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall --

* * *

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger

and more effective use of radio in the public interest;

* * *

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307. [47 U.S.C. 307]

* * *

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Sec. 325. [47 U.S.C. § 325]

(a) No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signals of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting sta-

tion without the express authority of the originating station.

Sec. 330. [47 U.S.C. § 330] (a) No person shall ship in interstate commerce, or import from any foreign country into the United States, for sale or resale to the public, apparatus described in paragraph (s) of section 303 unless it complies with rules prescribed by the Commission pursuant to the authority granted by that paragraph: Provided, That this section shall not apply to carriers transporting such apparatus without trading in it.

(b) For the purposes of this section and section 303(s) --

(1) The term "interstate commerce" means (A) commerce between any State, the District of Columbia, the Commonwealth of

Puerto Rico, or any possession of the United States and any place outside thereof which is within the United States, (B) commerce between points in the same State, the District of Columbia, the Commonwealth of Puerto Rico, or possession of the United States but through any place outside thereof, or (C) commerce wholly within the District of Columbia or any possession of the United States.

(2) The term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and the posessions of the United States, but does not include the Canal Zone.

APPENDIX B

Relevant Regulations of the Federal Communications Commission

§ 76.57 Provisions for systems operating in communities located outside of all major and smaller television markets.

A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5 shall carry television broadcast signals in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part:

(2) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station:

(3) Noncommercial educational television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part:

(4) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

(c) In addition to the television broadcast signals carried pursuant to paragraphs (a) and (b) of this Section any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.57 (a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.57(a): *Provided however,* That a community unit may carry a program to its completion: *And provided further,* That this paragraph does not authorize carriage in

the manner described above whenever a television broadcast station that the community unit must carry pursuant to § 76.57(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m. Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a), (b) and (c) of this section, any television station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior registration with the Commission.

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13866, July 14, 1972: 40 FR 39511, Aug. 28, 1975: 41 FR 30337, July 23, 1976: 42 FR 19346, Apr. 13, 1977: 43 FR 49008, Oct. 20, 1979]

§ 76.59 Provisions for smaller television markets.

A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part:

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part:

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part:

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt. - Plattsburgh, N.Y., television market):

(5) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or

expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educatinal translator station:

(6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit constituting all or part of a system having fewer than 1,000 subscribers may carry any additional television signals. Any such community unit constituting all or part of a system having 1,000 or more subscribers may carry sufficient additional signals so that, including the sig-

nals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of one independent television station: *Provided, however,* That, in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a)(1) of this section, shall be considered to be operational for a period terminating 18 months after grant of its initial construction permit.

(c) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry the signals of any noncommercial educational stations that are operated by

an agency of the State within which the community unit is located. Such community unit may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any local noncommercial educational station or State or local educational television authority.

(d) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (c) of this section, any such community unit may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior registration with the Commission.

(2) Any television station broadcasting a network program that will not be

carried by a station normally carried on the community unit. Carriage of such additional stations shall be only for the duration of the network programs not otherwise available, and shall not require prior registration with the Commission.

(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.59(a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.59(a): *Provided, however,* That a community unit may carry a program to its completion: *And provided further,* That this subsection does not authorize carriage in the manner described above whenever a television broadcast

station that the community unit must carrry pursuant to § 76.59(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m. Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the community unit is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior registration with the Commission.

(5) Any commercial UHF television station within whose Grade B contours the community of the system is located, in whole or in part.

(e) Where the community of a community unit is wholly or partially within both one of the first 50 major television markets and a smaller television market, the carriage provisions for the first 50 major markets shall apply. Where the community of a community unit is wholly or partially within both one of the second 50 major television markets and a smaller television market, the carriage provisions for the second 50 major markets shall apply.

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat. as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089; (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972: 40 FR 39511. Aug. 28, 1973: 41 FR 1066, Jan. 6, 1976: 41 FR 10902, Mar. 15, 1976; 41 FR 30337, July 23, 1976: 42 FR 19346, Apr. 13 1977, 42 FR 36834, July 18, 1977; 43 FR 20235, May 11, 1973; 43 FR 49009, Oct. 20, 1973]

§ 76.61 Provisions for first 50 major television markets.

A community unit operating in a community located in whole or in part within one of the first 50 major television markets listed in § 76.51(a) shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community

of the community unit is located, in whole or in part: *Provided, however,* That where a community unit is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the community unit is located is wholly within the specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section:

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part:

(3) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to

community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station:

(4) Television broadcast stations licensed to other designated communities of the same major television market (Example: Cincinnati, Ohio-Newport, Ky., television market):

(5) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such part of a system having fewer than 1,000 subscrib-

ers may carry any additional television signals. Any such community unit constituting all or part of a system having 1,000 or more subscribers may carry sufficient additional signals so that, including the signals required to be carried pursuant to paragraph (a) of this section, it can provide the signals of a full network station of each of the major national television networks, and of three independent television stations: *Provided, however,* That in determining how many additional signals may be carried, any authorized but not operating television broadcast station that, if operational, would be required to be carried pursuant to paragraph (a) (1) of this section, shall be considered to be operational, for a period terminating 18 months after grant of its initial construction permit.

(1) Whenever, pursuant to this

section a community unit is permitted to carry three additional independent signals, one of these signals must be that of a UHF television broadcast station.

(2) Whenever, pursuant to Subpart F of this part, a community unit is required to delete a television program on an independent signal carried pursuant to this section or a program on such a signal is primarily of local interest to the distant community (e.g., a local news or public affairs program), such community unit may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station. A program substituted may be carried to its completion, and the community unit need not return to its regularly carried signal until it can do so without interrupting a program already in progress.

(c) After the service standards specified in paragraph (b) of this section have been satisfied, a community unit may carry two additional independent television broadcast signals: *Provided, however,* That the number of additional signals permitted under this paragraph shall be reduced by the number of signals added to the community unit pursuant to paragraph (b) of this section.

(d) In addition to the noncommercial educational television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry the signals of any noncommercial educational stations that are operated by an agency of the State within which the community unit is located. Such community unit may also carry any other noncommercial educational signals, in the absence of objection filed pursuant to § 76.7 by any

local noncommercial educational station or State or local educational television authority.

(e) In addition to the television broadcast signals carried pursuant to paragraphs (a) through (d) of this section, any such community unit may carry:

(1) Any specialty station and any station while it is broadcasting a foreign language, religious or automated program. Carriage of such selected programs shall be only for the duration of the programs and shall not require prior registration with the Commission.

(2) Any television station broadcasting a network program that will not be carried by a station normally carried on the system. Carriage of such additional stations shall be only for the duration of the network programs not otherwise avail-

able, and shall not require prior registration with the Commission.

(3) Any television broadcast station during the period from sign-off of the last television broadcast station which the community unit must carry pursuant to § 76.61(a), or from 12:00 a.m. in the Central and Mountain Time Zones and 1:00 a.m. in the Eastern and Pacific Time Zones, whichever occurs first, to the sign-on of the first station which the community unit must carry pursuant to § 76.61(a): *Provided, however,* That a community unit may carry a program to its completion: *And provided further,* That this subsection does not authorize carriage in the manner described above whenever a television broadcast station that the community unit must carry pursuant to § 76.61(a) broadcasts continuously and does not sign-off during the hours from 12:00 a.m. to 6:00 a.m.

Carriage of such additional television signals shall not require prior registration with the Commission and shall be consistent with the network nonduplication protection and syndicated exclusivity rules of Subpart F of this part.

(4) Any television station broadcasting a network news program at any time when no station regularly carried is broadcasting the same program and when no station licensed to the market in which the community unit is located is broadcasting a local news program. Carriage of such additional stations shall be for the duration of the news program only and shall not require prior registration with the Commission.

(5) Any commercial UHF television station within whose Grade B contours the community of the system is located, in whole or in part.

(f) Where the community of a community unit is wholly or partially within both one of the first 50 major television markets and another television market, the provisions of this sections shall apply.

(Secs. 2,3,4,5, 301, 303, 307, 308, 309, 315, 317, 48 Stat. as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089: (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317)

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972: 40 FR 39511, Aug. 28, 1975; 41 FR 1066, Jan. 6, 1976: 41 FR 3868; Jan. 27, 1975; 41 FR 10902, Mar. 15, 1976; 41 FR 30337, July 23, 1976; 42 FR 19346, Apr. 13, 1977; 42 FR 36835, July 18, 1977, 43 FR 20235, May 11, 1978; 43 FR 49009, Oct. 20, 1978]

§ 76.63 Provisions for second 50 major television markets.

(a) A community unit operating in a community located in whole or in part within one of the second 50 major television markets listed in § 76.51(b) shall carry television broadcast signals only in accordance with the provisions of § 76.61, except that in paragraph (b) of § 76.61, the number of additional independent television signals that may be carried is two (2).

(b) Where the community of a community unit is wholly or partially within both one of the second 50 major television markets and one of the first 50 major television markets, the carriage provisions for the first 50 major markets shall apply. Where the community of a community unit is wholly or partially within both one of the second 50 major television markets and a smaller television market, the provisions of this section shall apply.

§ 76.65 Grandfathering provisions.

(a) The provisions of §§ 76.57, 76.59, 76.61, and 76.63 shall not require the deletion of any television broadcast or translator signals which a community unit was authorized to carry or was lawfully carrying prior to March 31, 1972: *Provided, however,* That if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart. If a community unit is authorized to carry signals, either by virtue of specific Commission authorization or otherwise, any other community unit already operating or subsequently commencing operations in the same community may carry the same signals. (Any such new community unit shall, before instituting service, register with the Commission of otherwise required by § 76.12.)

(b) The provisions of §§ 76.57, 76.59, 76.61 and 76.63 shall not be deemed to require the deletion of any television broadcast or translator signals which a system community unit having fewer than 50 subscribers but constituting all or part of a system having 1,000 or more subscribers was carrying prior to May 16, 1977, until the community unit has 50 subscribers.

(c) When, for purposes of ascertaining cable signal carriage rights or broadcast station rights to cable system carriage, reference is made to Grade B contours in §§ 76.57, 76.59, 76.61, or 76.63, such contours shall be the field intensity contours defined in § 73.683(a) of this chapter. *Provided, however,* That such rights as to signals carried or authorized for carriage on or before August 26, 1977, shall be determined by reference to the contour prediction rules adopted in

the Sixth Report and Order in Dockets 8736, 8975, 8976 and 9175, 41 FCC 148 (1952) as amended by Report and Order in Docket 17253 FCC 70-345, 22 FCC 2d 354 (1970).

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat., as amended 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089: (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278. Feb. 12, 1972, as amended at 42 FR 19346; Apr. 13, 1977; 42 FR 23510, May 9, 1977; 42 FR 36835, July 18, 1977; 43 FR 20235, May 11, 1978; 43 FR 48009, Oct. 20, 1978]

§76.151 Syndicated program exclusivity; extent of protection.

Upon receiving notification pursuant to §76.155: (a) No community unit operating in a community in whole or in part within one of the first 50 major television markets, shall carry a syndicated program,

pursuant to §76.61(b),(c),(d), or (e)(1)-(e)(4), for a period of 1 year from the date that program is first licensed or sold as a syndicated program to a television station in the United States for television broadcast exhibition:

(b) No community unit, operating in a community in whole or in part within a major television market, shall carry a syndicated program, pursuant to §§ 76.61(b), (c),(d) or (e)(1)-(e)(4), or 76.63(a) (as it refers to §76.61(b),(c),(d), or (e)(1)-(e)(4)), while a commercial television station licensed to a designated community in that market has exclusive broadcast exhibition rights (both over-the-air and by cable) to that program: *Provided, however,* That if a commercial station licensed to a designated community in one of the second 50 major television markets has such exclusive rights, a community unit located in

whole or in part within the market of such station may carry such syndicated programs in the following circumstances:

(1) If the program is carried by the community unit in prime time and will not also be broadcast by a commercial market station in prime time during the period for which there is exclusivity for the program:

(2) For off-network series programs:

(i) Prior to the first nonnetwork broadcast in the market of an episode in the series;

(ii) After a nonnetwork first-run of the series in the market or after 1 year from the date of the first nonnetwork broadcast in the market of an episode in the series, whichever occurs first;

(3) For first-run series programs:

(i) Prior to the first broadcast in the market of an episode in the series;

(ii) After two (2) years from the first broadcast in the market of an episode in the series;

(4) For first-run, nonseries programs:

(i) Prior to the date the program is available for broadcast in the market under the provision of any contract or license of a television broadcast station in the market;

(ii) After two (2) years from the date of such first availability;

(5) For feature films:

(i) Prior to the date such film is available for nonnetwork broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(ii) Two (2) years after the date of such first availability;

(6) For other programs; 1 day

after the first nonnetwork broadcast in the market or 1 year from the date of purchase of the program for nonnetwork broadcast in the market, whichever occurs first.

NOTE 1: For purposes of §76.151, a series will be treated as a unit, that is:

(i) No episode of a series (including an episode in a different package of programs in the same series) may be carried by a cable community unit, pursuant to §§76.61(b), (c),(d), or (e)(1)-(e)(4) or 76.63(a)(as it refers to §76.61 (b),(c), (d), or (e)(1)-(e)(4)) while any episodes of the series are subject to exclusivity protection.

(ii) In the second 50 major television markets, no exclusivity will be afforded a different package or programs in the same series after the initial exclusivity period has terminated.

NOTE 2: As used in this section,

the phrase "broadcast in the market" or "broadcast by a market station" refers to a broadcast by a television station licensed to a designated community in the market.

[37 FR 3278, Feb. 12, 1972, as amended at 42 FR 19347, Apr. 13, 1977; 42 FR 36835, July 18, 1977; 42 FR 41127, Aug. 15, 1977; 43 FR 36949, Aug. 21, 1978]

§ 76.153 Parties entitled to exclusivity.

(a) Copyright holders of syndicated programs shall be entitled to the exclusivity provided by § 76.151(a). In order to receive such exclusivity, the copyright holder shall notify each cable television system operator of the exclusivity sought in accordance with the requirements of §76.155.

(b) Television broadcast stations licensed to designated communities in the major television markets shall be entitled to the exclusivity provided by §76.151(b).

In order to receive such exclusivity, such television stations shall notify each cable television system operator of the exclusivity sought in accordance with the requirements of §76.155.

(c) In order to be entitled to exclusivity for a program under §76.151(b), a television station must have an exclusive right to broadcast that program against all other television stations licensed to the same designated community and against broadcast signal cable carriage of that program in the cable community: *Provided, however,* That such exclusivity will not be recognized in a designated community of another major television market unless such community is wholly within the television market of the station seeking exclusivity. In hyphenated markets, exclusivity will be recognized beyond the specified zone of a station only to the extent the station has

exclusivity against other stations in the designated communities of the market. In such instances, exclusivity to the extent a station has obtained it will be recognized within the specified zones of such other stations. It shall be presumed that broadcast rights acquired prior to March 31, 1972, are exclusive for the specified zones of all stations in the market in which the station is located. [37 FR 3278, Feb. 12, 1972, as amended at 42 FR 19347, Apr. 13, 1977]

§ 76.155 Notification.

(a) Syndicated program exclusivity notifications shall include the following information:

(1) For purposes of §76.151(a):

(i) The name and address of the copyright holder requesting exclusivity;

(ii) The name of the program or series for which exclusivity is sought;

(iii) The date of first sale or license of the program for television broadcast as a syndicated program in the United States.

(2) For purposes of § 76.151(b):

(i) The name and address of the television broadcast station requesting for which exclusivity is sought.
Exclusivity;

(ii) The name of the program or series

(iii) The dates on which exclusivity is to commence and terminate;

(iv) As to programs to be deleted from signals regularly carried by the system pursuant to §§ 76.61(b),(c),(d),(e)(1), or (e)(2) and 76.63(a) (as it refers to §76.61(b),(c),(d),(e)(1), or (e)(2): the name of the programs; the call letters of the station from which the deletion is to be made; and the date, time, and duration

of the deletion. Information, once supplied pursuant to paragraphs (a)(2)(i), (ii), (iii), or (a)(3) of this section, need not be repeated in any notification supplying the information required by the subparagraph.

(3) For purposes of §76.151(b) (as it relates to television stations licensed to designated communities in the second 50 major television markets), the following information shall be supplied in addition to that required by paragraph (a)(2) of this paragraph:

(i) Whether the program will be broadcast in prime time by the station requesting exclusivity during the period of protection provided in §76.151(b);

(ii) The specific rule pursuant to which exclusivity is requested (e.g., §76.151(b)(2) -- off-network series, §76.151(b)(3) -- first-run series);

(iii) For off-network series programs, the number of showings contracted for, including the number of repeat presentations, if any, and the date when the first run is to end.

(b) Subject to the provisions of paragraph (c) of this section, notifications given pursuant to §76.151 must be received no later than the Monday preceding the calendar week (Sunday-Saturday) during which exclusivity is sought.

(c) Direct notice of a change in the schedule of a television station against which exclusivity is sought, given to a cable television system operator by a television station seeking exclusivity, shall, if given more than 36 hours prior to the time a deletion is to be made, supersede prior notifications containing the information required by paragraph (a) of this section and any information otherwise

relied on pursuant to paragraph (d) of this section.

(d) In determining which programs must be delegated from a television signal when such information is not required to be provided pursuant to paragraph (a) of this section, a cable television system operator may rely on information from any of the following sources published or made available during the week the deletion is to be made or during the prior week:

(i) Newspapers or journals of general circulation in the service area of a television station whose programs may be subject to deletion;

(ii) A television station whose programs may be subject to deletion;

(iii) Any television station requesting exclusivity.

[37 FR 3278, Feb. 12, 1972, as amended at 39 FR 33532, Sept. 18, 1974; 42 FR 19347, Apr. 13, 1977]

§ 76.157 Exclusivity contracts.

With respect to each program as to which a television broadcast station licensee or permittee requests exclusivity pursuant to §76.151, such licensee or permittee shall maintain in its public file an exact copy of those portions of the exclusivity contract, such portions to be signed by both the copyright holder and the licensee or permittee, setting forth in full the provisions pertinent to the duration, nature, and extent of the exclusivity terms concerning broadcast signal exhibition (whether over-the-air or by cable) to which the parties have agreed.

§ 76.159 Grandfathering

The provisions of § 76.151 shall not be deemed to require a community unit to delete programming from any signal that was carried prior to March 31, 1972, or that any other community unit in the same community was carrying prior to March 31, 1972: *Provided, however,* That if carriage of a signal has been limited by Commission order to discrete areas of a community, any expansion of service will be subject to the appropriate provisions of this subpart.
[37 FR 3278, Feb. 12, 1972, as amended at 42 FR 13947, Apr. 13, 1977]

§ 76.161 Exception.

The provisions of §§ 76.99 and 76.151 shall not apply to a cable television system having fewer than 1,000 subscribers. Within sixty (60) days following the provision of service to 1,000 subscribers each such system operator shall file a notice to

that effect with the Commission and shall send a copy thereof to all television broadcast stations carried by the cable television system.

[42 FR 19347, Apr. 13, 1977]

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 865, 1284, 1285, 1286--September Term, 1980

(Argued March 19, 1981
Decided June 16, 1981)

Docket Nos. 80-4120, 80-4160, 80-4202, 80-4204

Malrite T.V. of New York, et al.,
Petitioners,

- v. -

Federal Communications Commission, United States of America,
Respondents.

Before:

Newman and Kearse, *Circuit Judges,* and Metzner,* *District Judge.*

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* The Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, sitting by designation.

Petition to set aside a Report and Order of the Federal Communications Commission repealing cable television rules on distant signal carriage and syndicated program exclusivity.

Denied.

Newman, *Circuit Judge:*

In a major reversal of its regulatory policy, the Federal Communications Commission ("FCC" or "Commission") has decided to deregulate cable television by rescinding rules relating to syndicated program exclusivity and distant signal carriage. Television broadcasting and programming interests have petitioned to set aside the FCC's order to reimpose the regulations, which have been in force since 1972. On November 19, 1980, we stayed the order pending the disposition of the appeal. We

now vacate the stay and deny the petition, thereby permitting the exclusivity and distant signal rules to be repealed.

I.

The television broadcasting industry, transmitting video signals free to viewers, is dominated by the three national networks, which contract with local station affiliates to carry network programming, most of which the networks purchase from independent producers. In addition, there are unaffiliated, independent stations which obtain most of their programming in the syndication market.[1] The cable television industry consists of various local systems, which transmit broadcast video signals from a central station to individual homes by closed circuit, coaxial cable. Cable subscribers pay a monthly fee

to receive a basic set of channels plus an optional fee for special channels (pay cable).

Each of the 1,000 broadcasting stations, affiliate or independent, operates along an electromagnetic frequency established by the FCC on either very high frequency (VHF) or ultra high frequency (UHF) channels. The VHF range produces a higher quality viewing signal than UHF for most viewers. Though the FCC had avidly supported the expansion of UHF channels as a means of providing increased program diversity and expression of local interests, UHF stations have been plagued with financial difficulties due to small audiences and low revenues, stemming in part from their inferior reception, and comprise the least profitable sector of the television industry. *See* R. Noll, M. Peck & J. McGowan, *Economic Aspects of Television*

Regulation 79-129 (1973) [hereafter "R. Noll, *et al.*"]; *Revised TV Broadcasting Financial Data-1978*, FCC Memo No. 30037 (July 17, 1980). The networks and their affiliates, which operate primarily in the VHF range, account for the largest audience shares and the vast majority of industry revenues and profits. *See* R. Noll, *et al.*, *supra* at 3-5, 16-18; *Revised TV Broadcasting Financial Data-1978*, *supra*.

Cable television mitigates some of the disadvantages faced by UHF stations by making possible improved reception; to a cable subscriber, the reception quality of a UHF signal is indistinguishable from a VHF signal. But cable provides an additional service by increasing the number of stations available to a viewer through the importation of signals from distant geographic areas using microwave relays or orbiting communications satellites. Cable

increases viewers' program choices, offering greater content and time diversity, and consequently it diverts some portion of the viewing audience away from local broadcast stations to more distant ones.

After an initial period in which the FCC declined to exercise regulatory authority over cable television on the grounds that it did not have jurisdiction under the Communications Act, *see Frontier Broadcasting Co. v. Collier*, 24 F.C.C. 251 (1958), *reconsideration denied in Report and Order in docket No. 12443*, 26 F.C.C. 403, 428 (1959), the FCC began to regulate the cable industry directly in 1966.[2] *See Second Report and Order in Docket Nos. 14895, 15233 and 15971*, 2 F.C.C.2d 725 (1966). The Supreme Court upheld the FCC's jurisdiction over cable in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), insofar as the particular regula-

tions were "reasonably ancillary" to the Commission's performance of its statutory duties. These 1966 regulations initiated close to a decade of regulation that can fairly be described as hostile to the growth of the cable industry, as the FCC sought to protect, in the name of localism and program diversity, the position of existing broadcasters, and particularly, the struggling UHF stations. *See* Besen & Crandall, *The Deregulation of Cable Television*, 44 Law & Contemp. Prob. 77 (1981); Chazen & Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 Harv. L. Rev. 1820 (1970). These rules severely restricted the expansion of cable television services by permitting cable operators in the top 100 markets to import distant signals only after showing in an evidentiary hearing that to do so would be in the public interest and not harmful to UHF

broadcast services.[3] While the cable industry continued to grow in the 1960's in spite of these restrictions and other costly operating requirements, such as mandatory program origination, access, channel capacity, and other equipment regulations, it entered the 1970's as a small industry, relegated primarily to rural areas and small communities due in large part to the FCC's policies. Besen & Crandall, *supra* at 79, 93.

In late 1971, the Commission began to consider relaxation of the cable television regulations. *See Commission Proposals for Regulation of Cable Television,* 31 F.C.C.2d 115 (1971) ("Letter of Intent" to Congress). Shortly thereafter, the 1972 regulations emerged from an industry-wide Consensus Agreement negotiated by the White House and the affected industry interests -- broadcasters, cable operators, and pro-

gram producers (copyright owners). *Cable Television Report and Order*, 36 F.C.C.2d 143 (1972). Though the 1972 Rules eased the 1966 restrictions and permitted limited cable expansion, broadcasting interests were still strongly protected. The Report and Order challenged on this appeal, *Report and Order in Docket Nos. 20988 and 21284*, 79 F.C.C.2d 663 (1980) [hereafter "Report and Order"], abolishes the core of the 1972 regulatory structure by repealing the two main methods of broadcaster protection, the distant signal carriage and syndicated program exclusivity restrictions on cable retransmissions.

The distant signal rules, 47 C.F.R. §§ 76.59(b)-(e), 76.61 (b)-(f), and 76.63 (1980), limit the number of signals from distant stations that a cable system can transmit to its subscribers, the limit varying according to market size and the

number of available over-the-air signals within the market. While cable systems are required to carry all local stations (defined as within 35 miles of the cable system's community), the number of distant signals that they can carry is limited as follows: in the top 50 markets, cable systems can make available a total of 3 network stations and 3 independents; in the second 50 markets, 3 networks and 2 independents; in the smaller markets, 3 networks and 1 independent; 2 "bonus" independent signals can be carried in major markets where local signals fill the allotted cable complement. By limiting the number of distant signals, the FCC sought to lessen potential adverse impact on the audience shares of local stations, a policy which has the additional effect of lessening the attractiveness of cable to potential subscribers.[4]

The syndicated program exclusivity rules, 47 C.F.R. §§ 76.151-76.161 (1980), authorize a local television station, which has purchased exclusive exhibition rights to a program, to demand that a local cable system delete that program from distant signals, whether or not the television station was simultaneously showing, or ever planning to show, the program. Copyright holders, in addition to broadcasters, are also protected by the rules and can require deletion of their programs from cable systems. The extent and duration of this protection varies according to market size, program type, and time of showing, with the greatest protection afforded to stations located in the largest markets.[5] Cable operators are allowed to substitute other distant signals when they have to delete a program under these rules.

These 1972 rules were fashioned in the

context of a continuing policy debate as to whether cable operators should face copyright liability for the programs they retransmitted to subscribers. Prior to Congress's revision of the copyright laws in 1976, the Supreme Court had consistently held that cable systems were not liable under the copyright laws for their use of copyrighted broadcast programs without the owner's consent. *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968). As a result of these rulings, while the broadcasting industry spent billions of dollars to create and purchase programming,[6] cable operators could retransmit those programs at their operating cost without making any payments to program suppliers. Losing in the courts, broadcasters sought FCC protection from what

they alleged was a situation of "unfair competition" by cable systems. The FCC rules restricting cable operators' ability to carry distant signals and syndicated programs served, in effect, as proxies for the copyright liability the courts had refused to impose, by restricting cable systems in their use of copyrighted works. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 176-77, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5659, 5792-93; Comment, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, 69 Calif. L. Rev. 527, 536-44 (1981). Indeed, the revision of the cable television rules in 1972 pursuant to the industry-wide compromise was undertaken with a view toward facilitating enactment of legislation imposing copyright liability on cable operators. *See Commission Proposals for Regulation of Cable Television, supra,* 31

F.C.C.2d at 115-16; *Geller v. FCC*, 610 F.2d 973, 974-75 (D.C. Cir. 1979) (*per curiam*).

The situation changed, however, in 1976, when Congress adopted a system of partial copyright liability for cable television with a compulsory licensing scheme. 17 U.S.C. § 111 (1976). Under the new Copyright Act, cable operators are expressly permitted to retransmit programs without any need to obtain the consent of, or negotiate license fees directly with, copyright owners, but in return they must pay the owners a prescribed royalty fee, based on the number of distant signals the system carries and its gross revenues. *Ibid. See generally Nimmer on Copyright*, § 8.18[E] (1980). After Congress had resolved the copyright issue by a system of compulsory licensing, the FCC commenced an inquiry into the need for maintaining its copyright surrogates, the distant signal and syndi-

cated exclusivity rules. *Notice of Inquiry in Docket No. 20988,* 61 F.C.C.2d 746 (1976) (announcing review of desirability of syndicated exclusivity rules); Notice of Inquiry in Docket No. 21284, 65 F.C.C.2d 9 (1977) (announcing sweeping review of economic relationship between cable and broadcast television industries).[7] These inquiries resulted in two extensive staff reports advocating elimination of the rules, *Report in Docket No. 20988, Cable Television Syndicated Program Exclusivity Rules,* 71 F.C.C.2d 951 (1979), and *Report in Docket No. 21284, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television,* 71 F.C.C.2d 632 (1979) [hereafter "Economic Inquiry Report"]. After considering several econometric and case studies concerning the impact of cable television on local station audiences and future cable penetration

rates, the Commission found that the impact on broadcasting stations from the deregulation of cable television would be negligible, and that consumers would be decidedly better off due to increased viewing options from the greater availability of expanded cable services.

In conjunction with the release of these reports, the FCC initiated an informal notice-and-comment rulemaking proceeding to eliminate the distant signal and syndicated exclusivity restriction. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284,* 71 F.C.C.2d 1004 (1979). After widespread public comment and administrative reevaluation, it issued the Report and Order, which adopted the proposal for repeal with three commissioners dissenting in whole or in part. The FCC also rejected a suggestion of the National Telecommunications and Information Administration (NTIA)

of the United States Department of Commerce that it impose a "retransmission consent" requirement on cable systems if it eliminated the distant signal and syndicated exclusivity rules. Under that proposal, cable operators would need the consent of the originating broadcast station before they could transmit non-network programming to their subscribers.[8] Both the United States Department of Justice and the United States Copyright Office opposed the NTIA proposal as contrary to Congress's mandate of a compulsory licensing system for cable television under the new Copyright Act, and the FCC adopted their view.

II.

Petitioners challenge the Commission's Report and Order, among other grounds, for seriously misconstruing the mandate of the

1976 Copyright Act and for being arbitrary and capricious. We conclude that a fair reading of the Copyright Act supports the FCC's position and that the FCC's action was neither arbitrary nor capricious. While the deregulation of the cable television industry raises serious policy questions, evidenced by the sharp division within the Commission as to the conclusions of the Report and Order, these questions are best left to the agencies that were created, in large part, to resolve them.

FCC Authority Under the Copyright Act

Petitioners' substantive argument concerning the FCC's interpretation of its regulatory authority over cable television under the Copyright Act is two-pronged: (1) that the Act's compulsory licensing system was premised on maintenance of the existing

regulatory framework and (2) that the Act does not prohibit adoption of a retransmission consent requirement. These claims are based on passages in the Act and its legislative history, allegedly indicating Congress's intention to leave the FCC with free rein to readjust inter-industry relations by regulation. Specifically, petitioners refer to the provision establishing the compulsory license, § 111, which premises the license upon the "carriage of signals . . . permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. § 111(c)(1). Petitioners contend that this language implied both that the FCC cannot upset the existing framework restricting the amount of programming cable systems can carry, and that the Commission can adopt rules conditioning cable retransmission upon receipt of broadcaster con-

sent, as the NTIA proposed, because the compulsory license covers only signals the FCC permits cable systems to carry pursuant to Commission rules. Petitioners further rely on a passage in the report of the House Judiciary Committee, which stated that the Committee did not intend to "interfere" with FCC rules or communications policy, and that the FCC should neither read the copyright legislation to touch on issues such as increased distant signal carriage, nor rely on it to enact any significant changes in the existing "delicate balance" of regulation in areas where Congress had not resolved the issue. H.R. Rep. No. 1476, *supra* at 89, [1976] U.S. Code Cong. & Ad. News at 5703-04. From these glimmerings of legislative intent, petitioners contend that the legislative scheme will not tolerate repeal of the distant signal or syndicated exclu-

sivity rules, but will accept a retransmission consent requirement.

We reject both contentions. Though Congress was aware of the underlying regulations restricting cable transmissions when it adopted the compulsory licensing system, it also recognized the legitimacy within the statutory plan of FCC modifications of that regulatory structure. Congress provided that the Copyright Royalty Tribunal ("Tribunal"), the entity established to collect and distribute the royalty fees, could readjust the statutory royalty rate if the FCC altered either the distant signal or syndicated program exclusivity rules. 17 U.S.C. 801(b)(2)(B) and (C) (1976). The plain import of §§ 801 is that the FCC, in its development of communications policy, may increase the number of distant signals that cable systems can carry and may eliminate the syndicated

exclusivity rules, in which event the Tribunal is free to respond with rate increases.

The views expressed in the House Report do not call for a different construction. Though perhaps revealing concern for congressional etiquette among the several committees with overlapping jurisdiction over the regulated subject matter, the comments do not foreclose the FCC's decision to repeal the distant signal and exclusivity rules. In repealing its rules, the FCC has heeded the Committee's caution against using the 1976 copyright legislation to determine matters that Congress "did not resolve." The FCC did not base its repeal of the cable regulations solely upon the revision, but upon a careful reassessment, in light of all the evidence, of the gains and losses to the public interest from deregulation.

While the Commission is not obliged by the Act to preserve existing rules, it is not free to adopt a new one that would be inconsistent with a basic arrangement of the new legislation. Retransmission consents would undermine compulsory licensing because they would function no differently from full copyright liability, which Congress expressly rejected. Under the NTIA proposal cable operators would be forced to negotiate individually with numerous broadcasters and would not be guaranteed retransmission rights, a scenario Congress considered unworkable when opting for the compulsory licensing arrangement.[9] H.R. Rep. No. 1476, *supra* at 89, [1976] U.S. Code Cong. & Ad. News at 5704; *see* Comment, *Regulatory Versus Property Rights Solutions for the Cable Television Problem*, *supra* at 550. A rule imposing a retransmission consent requirement would also directly

alter the statutory royalty formula by precipitating an increase in the level of payments of cable operators to obtain consent for program use. Such a rule would be inconsistent with the legislative scheme for both the specific compensatory formula and the appropriate forum for its adjustment. In an era of compulsory copyright licensing,[10] we find it difficult to imagine that Congress intended its formula for royalty fees to be only a minimum subject to FCC alteration, since it delegated broad discretionary authority to the Tribunal, and not the FCC, to readjust the rates if regulatory action so required. Congress did not specifically set the royalty rate for other types of compulsory licenses established under the new Act. *See* 17 U.S.C.§ 118(1976) (public broadcasting royalty rates set by Tribunal). To hold that the compulsory license formula

sets only a minimum, and not a maximum rate (subject to Tribunal adjustment), would undermine the carefully established legislative arrangement.[11]

Review of the FCC's Rulemaking Process

Apart from arguments based on the Copyright Act, petitioners contend that the FCC's determination to repeal the cable television regulations should be set aside as arbitrary and capricious. 5 U.S.C. § 706(2)(A) (1976). The scope of judicial review of informal rulemaking under the Administrative Procedure Act is circumscribed. Though a reviewing court is to be "searching and careful" in its inquiry to ensure that the agency has articulated a "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962), it cannot substitute

its judgment for that of the agency. *Citizens to Protect Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

The Report and Order repealing the cable television regulations followed several years of thorough study by FCC staff and extensive public commentary, both before and after reports of findings were issued in 1979. Numerous econometric studies, as well as case studies of existing markets where cable systems had been less strictly regulated because of "grandfathering" provisions in the FCC regulations,[12] were carefully evaluated in reaching the administrative decision. Petitioners challenge the FCC's use of the vast material compiled in the proceeding as biased and irrational, contending that the FCC's conclusion that broadcasting stations would not be injured from cable deregulation was unfounded, and that the FCC failed

to consider fully, or impartially, data projecting its decision's adverse economic impact on station finances and program supply. For example, the professional sports leagues claim the Commission did not consider the effect of deregulation on sports programming; the independent television stations charge it with viewing the industry as a whole, thereby ignoring the adverse impact on independents; and American Broadcasting Companies, Inc. ("ABC") contends that the FCC failed to consider the effects of deregulation upon different groups of viewers.

The FCC specifically responded to petitioners' factual and theoretical assertions in the Report and Order, articulating clear reasons when it rejected, or did not fully use, the economic predictions in industry studies due to erroneous assumptions or modeling

flaws. *E.g., Economic Inquiry Report, supra,* 71 F.C.C.2d at 677-78 (rejecting certain results of Wharton Econometric Forecasting Associates study for National Association of Broadcasters because it used a formula that biased results toward smaller independent stations), reasserted in *Report and Order, supra,* 79 F.C.C.2d at 696. It commissioned an outside economist to reanalyze the data in his study, one on which the FCC's 1979 reports relied, after incorporating industry criticisms of his techniques; his results were unchanged. Appendix B, *Report and Order, supra,* 79 F.C.C.2d at 827 (Rand Note, prepared for FCC by R. Park). The Report and Order thus reasserted the 1979 reports' conclusion that unregulated cable television would divert less than ten per cent of local station audiences, a result that would have only a slight effect on broadcasting

industry revenues and the supply of programming. We cannot conclude that this finding was arbitrary or capricious. The Commission offered a rational explanation for its policy founded on a predictive judgment well within its authority. *See FCC v. WNCN Listeners Guild*, ____ U.S. ____, 49 U.S.L.W. 4306 (Mar. 24, 1981).

Nor do we think the FCC assigned too little significance to, or overlooked, any of the contentions by any of the pertinent segments of the industry. While independent stations are less profitable than network affiliates, there were data indicating that local affiliates were subject to greater audience diversion than independents, *e.g.*, R. Noll, *et al.*, *supra* at 162-69, that UHF stations, most of which are independent, benefited from cable television in terms of improved viewing quality, *e.g.*, *id.* at 166, and that independent

stations in the grandfathered markets prospered, *Economic Inquiry Report, supra,* 71 F.C.C.2d at 698-701. Though in the past the FCC has accorded special treatment to UHF stations, it is not required to do so when in its judgment the public interest would be disserved; the FCC's statutory directives are to promote a "rapid, efficient" nationwide communications service and to encourage its use in the "public interest," 47 U.S.C. §§ 151, 303 (1976), neither of which commands a specific industry structure or protection of any particular stations from financial difficulty or even failure. Moreover, the FCC reviewed the circumstances of broadcast stations that filed comments alleging current or potential injury from cable television and found that cable had not adversely affected those stations. *Economic Inquiry Report, supra,* 71

F.C.C.2d at 711. The concerns of independent broadcasters were adequately considered by the FCC and did not require retention of either set of rules.

The independent stations further maintain that the FCC should have grandfathered existing syndicated program exclusivity contracts. The FCC was not required to take such action upon elimination of the exclusivity rules. The property of regulated industries is subject to such limitations as may reasonably be imposed in the public interest, and consequently, as numerous courts have recognized, regulations may be adopted that abolish or modify preexisting interests. For example, in *General Telephone Company of the Southwest v. United States*, 499 F.2d 846, 863-64 (5th Cir. 1971), FCC rules were upheld requiring telephone companies to divest their interests in cable television

systems; in rejecting a grandfathering claim, the Court stated that the FCC should not be limited to building on the status quo when seeking to impose a regulatory policy. Moreover, in deciding not to grandfather existing exclusivity rights, the Commission considered evidence indicating that these exclusivity rights were rarely asserted.

The sports programming issue was not as thoroughly reviewed by the Commission in the preliminary stages of the rulemaking process as other issues, such as the effect on independent stations, because no change in the primary means of sports program protection, the home broadcast black-out rules, 47 C.F.R. § 76.67 (1980), was ever contemplated. However, the Commission did respond to the sports leagues' comments in the Report and Order. The leagues contend that cable television, by making available

more broadcasts of games from distant cities when a club is playing at home, will decrease gate receipts, threaten the league concept by hurting weaker franchises, and ultimately lead to less sports programming. But the leagues did not produce any evidence that the number of sports broadcasts by home clubs has been reduced in the existing areas of high cable penetration, or would be reduced in the future. Further, as the FCC noted, many variables besides the availability of sports programming on television influence gate attendance, such as the weather and the caliber of the home and visiting teams. It was not arbitrary for the FCC to conclude that sports programming requires no special protection after the repeal of the distant signal rules.

Finally, the FCC's action is not deficient, as ABC contends, for lack of precise assessment of the impact of repeal on discrete groups of viewers. While the FCC did not conduct detailed demographic studies of cable and noncable television audiences, this fact does not lessen the validity of its conclusion that deregulation is in the public interest. Though lower-income families benefit more from a system of free television than from cable television, *see* R. Noll, *et al.*, *supra* at 25-26, the expansion of cable services was reasonably found not to threaten the basic nature of free television. Given current and estimated cable penetration rates and the profitability of the broadcasting industry, we do not doubt the reasonableness of the FCC's conclusion that programming on free television will not substantially change or diminish after deregulation.[13] If free

television retains its existing programming, then there is an increase in overall consumer welfare and no significant inequity among groups of viewers from the FCC's decision: those who do not purchase cable are substantially unaffected in their viewing patterns, while those who do, being able to pay for programming, some of which does not generate sufficient mass appeal to be aired on free television, receive a service more responsive to their viewing preferences. *See id.* at 136.[14]

Ultimately, the task in adopting rules to achieve the appropriate mix between broadcast and cable services requires determining a desired tradeoff between the inefficiency of the pricing system of cable television and the inadequacy of programming under free television.[15] Since the marginal cost of programs for an extra viewer is zero, any price paid by a cable

subscriber for receiving television signals is inefficient.[16] Though free television is price efficient, because advertisers and not viewers pay for programming, the pricing does not reflect the intensity with which viewers prefer to see certain types of shows. *See* Spence & Owen, *Television Programming, Monopolistic Competition and Welfare,* 91 Q.J. Econ. 103 (1977). Free television consequently limits program diversity by its concentration on mass audience shows, which make advertising worthwhile. In shifting its policy toward a more favorable regulatory climate for the cable industry, the FCC has chosen a balance of television services that should increase program diversity, a valid FCC regulatory goal, *see FCC v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 795-97 (1978); *United States v. Midwest Video Corp.,* 406 U.S. 649,669 (1972)

(plurality opinion). While there will undoubtedly be more of the same type of mass audience programming now populating the national networks on cable channels as well, the unlimited number of cable channels holds out the best possibility for special interest programming. As the market shares for mass audiences are divided up among the several stations, programming will be purchased to capture the next largest share, selective audiences, *see* R. Noll, *et al.*, *supra* at 151; Spence & Owen, *supra*, and programs will be supplied when revenues exceed cost and not only when a specific audience size is attained, as under the advertiser-supported system.

The Commission's repeal of the distant signal and syndicated exclusivity rules, after widespread participation of all industry segments and comprehensive evaluation of technical data, reflects the

"rational weighing of competing policies" Congress intended to be exercised by the agency and to be sustained by a reviewing court.[17] *See FCC v. National Citizens Committee for Broadcasting, supra,* 436 U.S. at 803.

Burden of Proof in the Proceedings

Petitioners raise one futher contention that merits attention. They argue that the FCC impermissibly shifted the burden of proof in its rulemaking proceeding to those parties seeking retention of the regulations. We disagree. After an extended inquiry into the effect of the existing regulations and the state of the industry that encompassed several years of investigation, and thorough consideration of the vast material compiled, the FCC concluded that the existing regulations should be repealed. Only after receiving

that evidence did the FCC ask members of the public who disagreed with its findings to produce data showing how they would injured by deregulation since it had not found any evidence to that effect. Such action did not reverse the burden of proof because the FCC had already produced an overwelming mass of evidence supporting elimination of the rules. Rather, its request for data, evincing a desire for widespread participation from all interested segments of the public who might be aware of information that the agency's intensive inquiry did not uncover, reflects the proper exercise of reasoned decision-making.

The petition to set aside the Report and Order is denied.

1 Syndicated programming, supplied by independent producers, consists of either programs previously broadcast on network stations or newly produced programs. Unlike network programming, simultaneous broadcasting of syndicated programming is infrequent because the independent stations do not all purchase the same programs. *See* Besen, Manning & Mitchell, *Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem*, 21 J.L. & Econ. 67,77 (1978).

2 The Commission began regulating the cable industry indirectly as early as 1962, when it denied a request for a permit by a common carrier to install microwave relays to carry signals for a cable telvision system. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. cir.), *cert. denied*, 375 U.S. 951 (1963). The Commission held that granting the permit, though improving the cable system's service its subscribers, was not in the public interest because it would adversely affect the economic operation of a local broadcast station.

3 There are about 200 television markets in the United States. Eighty-six percent of the approximately 74 million television households are located in the top 100 markets; 33 percent are in the top 10 markets. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284*, 71 F.C.C.2d 1004, 1011 (1979). About one-third of all television households have access to cable service, and about 19 percent of all television households suscribe. *Id.* at 1013-14. The house-

holds for which a cable connection is available are located primarily outside of the major metropolitan markets. *Report in Docket No. 21284, Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television,* 71 F.C.C.2d 632, 664-65 (1979) [hereafter "Economic Inquiry Report"].

4 One of the major reasons for subscribing to cable is the access to more programming. Consequently the penetration rate, that is, the per cent of households subscribing of those with access to the system, varies with the number of signals imported. Several economic studies have estimated the value of additional signals to viewers, and, in general, conclude that carriage of four distant independent signals increases cable penetration rates by an average of at least 9 percentage points *See Economic Inquiry Report, supra,* 71 F.C.C.2d at 670. For specific calculations *see, e.g.,* Charles River Associates, Inc., *An Analysis of the Demand for Cable Television* 47 (1973); R. Noll *et al., supra* at 277-78.

5 For example, in the top 50 markets, at the request of a local station, cable operators must delete all syndicated programs under exclusive exhibition contract to the requesting station, regardless of when the program is scheduled for showing on the local station, and program copyright owners can request deletion for one year after the first syndicated sale of the program, even if no local station has the rights to exhibit it. In the second 50 mar-

kets, distant syndicated programs need not be deleted if broadcast in prime time unless the requesting local station is also planning to air the program in prime time, and exlusivity rights expire at specified time periods or on the occurrence of specified events, depending on the nature of the program, e.g., first-run syndicated series and feature films are protected for two years while reruns of network series are protected for only one year. Only systems in the top 100 markets are subject to these rules.

Though much less comprehensive in coverage, exclusivity rules exist for network programming. Duplication of network programming is prohibited with respect to simultaneous showings. 47 C.F.R. §§ 76.92-76.99 (1980). The duration of network program protection is more limited than that for syndicated programs in part due to the different methods of distribution. Unlike network programs, which are shown at the same time on virtually all affiliates as they come over the air, with exceptions for stations in different time zones that involve program retaping, syndicated programs are shown at separately-scheduled, diverse time by each purchasing independent station. Moreover, cable systems may not carry more than three network signals, which reduces the possibility of duplication of local affiliate programming, whereas they can carry several independent signals, which increases the likelihood of a syndicated program being duplicated. The network nonduplication rules, as well as rules requiring the blacking out

of certain live sports programs, 47 C.F.R. § 76.67 (1980), are not altered by the Report and Order challenged on appeal, though petitioners Commissioner of Baseball, National Football League, National Basketball Association, and National Hockey League, and intervenors American Broadcasting Companies, Inc., and Jet Broadcasting Company, Inc., contend that repeal of the distant signal and syndicated exclusivity rules will decrease the effectiveness of the network and sports programming regulations.

6 For instance, in 1977, total production costs of the three networks and all television stations were $2,878 million, and the cost of packaged programs, that is, the expenses of purchasing programs from independent producers, was $1,482 million. *Notice of Proposed Rule Making in Docket Nos. 20988 and 21284, supra,* 71 F.C.C.2d at 1018; *see generally* R. Noll, *et al., supra* at 63-79.

7 This reevaluation was further prompted by *Geller v. FCC, supra,* 610 F.2d at 980, which required the FCC to review the necessity of retaining the syndicated exclusivity rules.

8 The NTIA proposal would have required consent for only new and expanding cable systems and would have grandfathered existing systems because they were built on the basis of either no or partial copyright liability. On this appeal petitioners do not seem to envision such a limited retransmission consent rule, though their arguments are not directed to the content of such a regulation but

rather to the FCC's ability to impose a consent requirement in general.

9 The FCC's experiment with a retransmission consent approach to the problem bears out Congress's concerns. In 1968 the FCC suspended the hearing process required by its 1966 rules in favor of compliance with then proposed rules requiring cable systems in the top 100 markets to obtain consent from distant stations before transmitting their signals. *Notice in Docket No. 18397*, 15 F.C.C.2d 417 (1968). This experiment resulted in virtually all denials of retransmission rights, leading the period to be known as the "freeze" on cable growth. *See Economic Inquiry Report, supra*, 71 F.C.C.2d at 651. There would be little difference as to feasibility considerations whether consent had to be obtained from program producers, which was Congress's focus, or broadcast stations.

10 The 1976 Copyright Act provided for blanket licensing in several contexts in addition to cable television. *See* 17 U.S.C. § 116 (1976) (juke boxes); *id.* § 115 (mechanical royalties); *id.* § 118 (public broadcasting).

11 Because we find that the FCC's rejection of a transmission consent requirement was based on a proper construction of the Copyright Act, we do not reach petitioners' further contentions that such a requirement, if not prohibited by the Copyright Act, would be permissible under the Communications Act, 47 U.S.C. § 151 *et seq.* (1976).

12 Under 47 C.F.R. §§ 76.65 and 76.99 (1980), the regulations regarding distant signal and syndicated exclusivity, respectively, were made inapplicable to signals being transmitted by cable systems prior to March 31, 1972.

13 As in *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) *(per curiam), cert. denied,* 434 U.S. 829 (1977) (vacating FCC rules restricting pay cable showing of certain feature film and sports programming), there was no significant evidence presented of program siphoning.

14 Although in a system of only pay television (whereby the viewer pays per program or per channel, and not simply a cable subscription and installation fee) the distrIbutional effect would be to shift income from consumers to the television industry; under a cable system consumers under a cable system consumers gain, and it is the broadcasting network segment that loses due to increased competition from independent stations. R. Noll, *et al, supra* at 135, 173-74, 182.

15 The bulk of the empirical data supports the FCC's position that deregulation will have only a negligible adverse impact on broadcast programming, but plausible economic arguments can be and were made on both sides. Because television is in the nature of a "public good," that is, an increase in the amount available for consumption by one viewer does not reduce the amount available for consumption by other viewers, the marketplace may not produce

the optimal mix of programming. *See* Besen, Manning & Mitchell, *supra* at 13; Samuelson, *Aspects of Public Expenditure Theories*, 40 Rev. Econ. & Stat. 332 (1958); Samuelson, *The Pure Theory of Public Expenditure*, 36 Rev. Econ. & Stat. 387 (1954). The distant signal and syndicated exclusivity rules, in the absence of full copyright liability for cable operators, could function to avoid the problems involved in the private production of a public good like television, by excluding nonpurchasers, who would otherwise be able to enjoy a "free ride" by freely consuming the good and letting others pay for it. *See* Demsetz, *Private Production of Public Goods*, 13 J.L. & Econ. 293 (1970). Economists differ over the effect of eliminating these rules on the supply of programming, and consequently, on the gains in public welfare from pursuing such a regulatory policy. *Compare* R. Noll, *et al.*, *supra* at 66-67, 149 (program supply will not be affected because producers currently receive excessive rents, and may even increase with expansion of cable) *and* Spence & Owen, *Television Programming, Monopolistic Competition and Welfare*, 91 Q.J. Econ. 103 (1977) (program supply will increase from larger market given relatively unlimited channel capacity of cable), *with* Besen, Manning & Mitchell, *supra* at 81, 85 (program supply will be reduced because program producers cannot collect full value of their work).

16 In economic terms, price equals marginal cost in competitive equilibrium. *See generally* W. Nicholson, *Microeconomic Theory* (2d ed. 1978).

17 As one commentator has noted, the more the question of agency choice comes to resemble a political process, weighing the claims of competing interest groups, the less apparent justification for judicial supervision of Congress's delegation of choice to the agency. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1787 (1975).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL APPENDIX

ERWIN G. KRASNOW
RAUL R. RODRIGUEZ
National Association of Broadcasters
1771 N St., N.W.
Washington, D.C. 20036
(202) 293-3560

Attorneys for Petitioner
National Association
of Broadcasters

MICHAEL S. HORNE
DONNA M. MURASKY
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioners Hubbard Broadcasting, Inc., Midwest Television, Inc., Post-Newsweek Stations, Inc., and John Blair & Company

SAMUEL MILLER
MILLER AND FIELDS
1901 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-2700

Attorney for Petitioner Malrite T.V. of New York, Inc.

ARTHUR B. GOODKIND
KOTEEN & BURT
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-5700

Attorney for Petitioner McGraw-Hill Broadcasting Company, Inc.

JAMES A. MCKENNA, JR.
ROBERT W. COLL
STEVEN A. LERMAN
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Attorneys for Petitioner American Broadcasting Companies, Inc.

GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS INC.
51 West 52 Street
New York, New York 10019
(212) 975-4321

Attorneys for Petitioner CBS Inc.

JEROME J. SHESTACK
R. CLARK WADLOW
SCHNADER, HARRISON, SEGAL & LEWIS
1111 Nineteenth Street, N.W.
Washington, D.C. 20006
(202) 463-2900

Attorneys for Petitioner National Broadcasting Company, Inc.

J. LAURENT SCHARFF
MARK J. TAUBER
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner Association of Independent Television Stations, Inc.

LEE M. MITCHELL
TOM W. DAVIDSON
SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 624-9000

Attorneys for Petitioner Field Communications Corporation

THOMAS J. DOUGHERTY
PRESTON R. PADDEN
METROMEDIA, INC.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(202) 244-5151

Attorneys for Petitioner Metromedia, Inc.

DAVID H. LLOYD
ROBERT ALAN GARRETT
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-3600

Attorneys for Petitioner Commissioner of Baseball

PHILIP HOCHBERG
VORYS, SATER, SEYMOUR AND PEASE
1828 L Street, N.W.
Suite 1111
Washington, D.C. 20036
(202) 822-8200

Attorney for Petitioners National Basketball Association and National Hockey League

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FCC 80-442

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Cable Television Syndicated Program Exclusivity Rules	Docket 20988 RM-2721
In the Matter of	
Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television	Docket 21284 RM-2919 RM-3324 RM-3346

MEMORANDUM OPINION AND ORDER

(Adopted: July 22, 1980; Released: September 9, 1980)

BY THE COMMISSION: COMMISSIONERS LEE, QUELLO AND WASHBURN DISSENTING.

1. On July 12, 1979, the Commission denied a "Joint Motion for Revision of Procedures" filed by the Association of Independent Television Stations, Inc.; Caucus for Producers, Writers, and Directors; Metromedia, Incorporated; Motion Picture Association of America, Inc.; National Association of Broadcasters; National UHF Broadcasting Association; and Screen Actors Guild. This petition had requested that the Commission designate the factual issues in dispute in this

proceeding for hearing before an Administrative Law Judge who would take evidence and certify the record to the Commission.[1] Since the opportunity for submission of initial comments had yet to expire, the Commission expressed its opinion that the better course of action would be to withhold a determination on this request until comments had been filed. Accordingly, the Commission's denial of the request was made without prejudice to the parties' renewing their request at a later date. On September 17, 1979, the Motion Picture Association of America, in formal comments filed in this proceeding, reiterated a request for evidentiary hearing.[2] On November 7, 1979 the National Association of Broadcasters (NAB) filed a "Request for Oral Argument" in this proceeding.

Evidentiary Hearing

2. We are able to approach the question of the utility of cross-examination procedures in informal rulemaking matters, such as the proceeding herein, with the assistance of considerable, sometimes divergent, discussion of this subject by both courts and commentators. Indeed, commentary on the sufficiency and adequacy of notice and comment procedures as provided for by the Administrative Procedure Act in informal rulemaking proceedings as well as on the value of extra-procedural tools in these kinds of proceedings has been quite extensive. Some commentators suggest that the reasoning of some of those court decisions[3] recommending extra-procedural devices in certain circumstances has some "intuitive appeal," but believe that such an approach could lead toward "over-proceduralization" and overkill of the very purpose for which administrative agencies were created. *See, e.g.*, Wright, "Court of Appeals Review of Federal Regulatory Agency Rulemaking," 26 *Admin. L. Rev.* 199 (1974). Others suggest that the benefits of cross-examination, when actually analyzed, are in reality very limited and that a far more important consideration which agencies should concern themselves with is the

[1] The joint motion had recommended as well that the Commission suspend the submission of comments and reply comments and set dates for findings and comments upon conclusion of the proposed evidentiary hearing.

[2] Only the Motion Picture Association of America and the National Association of Broadcasters renewed the request. The Caucus for Producers, Writers, and Directors, the National UHF Broadcasting Association and Screen Actors Guild not only did not renew their request but filed no comments at all. Other parties in their comments have expressed support for the initial request.

[3] *See, e.g., International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 629–631 (D.C. Cir. 1973), one of the leading cases which first set the tone for debate over consideration of cross-examination techniques in rulemaking proceedings, where the court indicated "that a right of cross-examination, consistent with time limitations, might well extend to particular cases of need" but in this case held "that the absence of a general right of cross-examination" was not "a departure from 'basic considerations of fairness.' " See also *Appalachian Power Co. v. EPA*, 477 F. 2d 496 (4th Cir. 1973); *Walter Holm & Co. v. Hardin*, 449 F. 2d 1009 (1971); *O'Donnell v. Shaffer*, 491 F. 2d 59 (D.C. Cir. 1974).

vital principle of "assuring challengers timely access to the critical reasoning processes of the agencies." *See, e.g.*, Williams, " 'Hybrid Rulemaking' under the Administrative Procedure Act; A Legal and Empirical Analysis," 42 *U.Chi.L.Rev.* 401 (1975). Professor Davis, who is a leading commentator in the administrative law area, welcomes the trend favoring the use of new devices for providing procedural protections, *e.g.*, two cycles of notice and comment, but, in addressing the subject of specific use of cross-examination, appears to concede that experience with this procedural device has proved less than satisfactory. *See*, Davis, 1 *Administrative Law Treatise* §6.39 (2d Ed. 1978). Instead of the different approaches expounded by the courts on the matter in which agencies should handle "identified issues of specific fact," Professor Davis would prefer that of Recommendation 72-5 of the Administrative Conference of the United States which favors "trial-type hearings in rulemaking 'on issues of specific fact' " and suggests "that 'Congress should never require trial-type procedures for resolving questions of policy or of broad or general fact.' " *Id.* at §6.20. What underlies this current thought on the subject by both courts and commentators is not, however, that particular procedural devices should be mandated but rather that the administrative process utilized, when considered as a whole, assures that agency decisions are reached in a manner consistent with notions of fairness and adequate public participation and that they are supported by sufficient data and sufficiently comprehensible projections and policy judgments. *See* Wright, *supra*, at 200.[4]

3. Very recently, the Supreme Court had occasion to consider the adequacy of the procedures prescribed by the Administrative Procedure Act in rulemaking matters in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Therein, the Court said "that generally speaking this section [5 U.S.C. 553] of the Act established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures." *Id.* at 524. (footnote omitted). The Court held:

> Absent constitutional constraints or extremely compelling circumstances "the administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.' " *Federal Communications Commission v. Schreiber*, 391 U.S. 279, 290 (1965), quoting from *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143, (1940).

Id. at 543. The basic principle to be distilled from this case is that as long as the administrative agency employs at least the statutory *minima*, reviewing courts should refrain from "engrafting their own

[4] For additional commentary on the subject, *see* Verkuil, "Judicial Review of Informal Rulemaking," 60 *Va.L.Rev.* 185 (1974); Hamilton, "Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking," 60 *Calif.L.Rev.* 1276 (1972).

notions of proper procedures upon agencies entrusted with substantive functions by Congress."[5] *Id.* at 525.

4. We believe that this decision is especially relevant to the present petition under consideration here to the extent that this petition strongly suggests that the Commission is obligated to have as a minimum a limited evidentiary hearing in this rulemaking proceeding. The *Vermont Yankee* case specifically addressed a lower court decision which had determined the intervenors' primary argument to be whether "the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process" and which considered the issue for decision to be "whether the procedures provided by the agency were sufficient to ventilate the issues."[6] Even though the lower court admitted that, absent extraordinary circumstances, reviewing courts should not prescribe the procedural format which an agency should use to explore a given set of issues and even though the court appeared to recognize that the agency had employed all the procedures required under Section 553 of the Administrative Procedures Act, the clear import of its decision was to require the agency to undertake additional procedures beyond those called for under the Act.[7] The *Vermont Yankee* case, in overruling the lower court decision, would seem to indicate quite clearly that administrative agencies have wide discretion in determining whether procedural devices in addition to those required under Section 553 of the Administrative Procedure Act are necessary and that the necessity in undertaking the fashioning of additional procedural safeguards in rulemaking matters is, if such circumstances exist, extremely rare.

5. We believe that this summary of the relevant law places in perspective our responsibility under the Administrative Procedure Act and applicable case law thereunder with respect to the present request.

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[5] The Court did indicate, however, that there may be circumstances which might justify overturning agency action on the basis that the agency failed to employ adequate procedures b ut stated that "such circumstances, if they exist, are extremely rare." *Id.* at 524. The Court did state that "[a]gencies are free to grant additional procedural rights in the exercise of their discretion," *Id.* at 524, but seemed to caution that "a totally unjustified departure from well settled agency procedures of long standing might require judicial correction." *Id.* at 542. (footnote omitted).

[6] *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 547 F. 2d 633, (D.C. Cir. 1976).

[7] E.g., the court stated:

> Of necessity, assessing agency procedures requires that the reviewing court immerse itself in the record. Abstract characteristics are an unsatisfactory guide for determining what procedures are necessary in particular proceedings. Alternative procedural techniques are usually available, and the absence of one device, such as cross-examination, may be compensated for by the sensitive use of substitutes. If the review is to be meaningful, it must focus on the actual operation of the whole range of procedures in a particular setting—including 'context of fact, statutory framework and nature of action.' " *Id.* at 644–645. (footnotes omitted).

We come therefore to the question of whether the requested evidentiary hearing would be appropriate, or is necessary, in the context of this specific rulemaking proceeding. Among the major arguments pressed upon us in support of this petition is that the use of this procedure is necessary to assure that a full opportunity is afforded interested persons to comment on the instant proposals. It is argued that the uniqueness and importance of this rulemaking proceeding requires that a more thorough opportunity to explore the issues involved be provided. It is said that assurance of the soundness of the bases for the Commission's proposed new regulatory course can only be provided if the Commission's *Reports* [8] are exposed to the crucible of an evidentiary proceeding to explore specified questions designed to test the validity of the conclusions. In essence, the main thesis of the petition is that opportunity for meaningful participation in this proceeding cannot be achieved other than by providing an opportunity for cross-examination. We do not ascribe to this viewpoint.

6. We firmly believe that an ample opportunity for meaningful participation has been provided at every critical juncture of this proceeding. When we commenced our examination into the economic relationship between television broadcasting and cable television with our *Notice of Inquiry in Docket 21284*, 65 FCC 2d 9 (1977), we emphasized the importance of the proceeding in terms of a re-examination of our cable regulatory program which hitherto had heavily relied upon "a more or less intuitive model" and with particular reference to the "critical assumptions that are often relied upon in analyzing cable television's effect on local broadcast stations." Para. 2, *id.* at 9. Thus, in view of the important questions raised in this notice which reflected upon the gravity of the underlying policy matters, we agreed upon a liberal time period of approximately six months for initial comments, considerably in excess of what had been provided in a substantial number of other proceedings. We also stated our intention to delay announcement of a reply comment period until "we [had] some indication of the number and complexity of the comments received." Paras. 23–26, *Id.* at 23. And in order "to assure the fullest possible participation in the Inquiry," we twice formally extended the time to submit comments and reply comments, we accepted a late-filed study considered to be of critical importance and provided a period for responses thereto and we accepted and considered several other comments filed out of time.[9] We have, in essence, acceded to every

[8] *Report in Docket 20988*, FCC 79-242, 71 FCC 2d 951 (1979) *(Syndicated Exclusivity Report)* and *Report in Docket 21284*, FCC 79-241, 71 FCC 2d 632 (1979) *(Economic Inquiry Report)*.

[9] See para. 5 n. 4 of the *Economic Inquiry Report*, *supra*. Our procedures stemming from the *Notice of Inquiry in Docket 20988*, 61 FCC 2d 746 (1976), were not significantly at variance with those noted ab ove. There, we twice extended the time period for comments and reply comments and we also considered other comments filed out of time.

reasonable request made upon us to insure full and adequate participation.[10]

7. Our administrative procedures, which apply to the *Notice of Proposed Rulemaking in Dockets 20988 and 21284*, FCC 79-243, 71 FCC 2d 1004 (1979), are the same as those which were applied to the inquiry phase of this proceeding which, we note, apparently were not deemed unsatisfactory by petitioners here. We wish to point out that our rationale for recommending elimination of the cable television distant signal carriage rules and syndicated program exclusivity rules, including the essential information utilized as well as the methodology employed in reaching our tentative conclusions, has been fully articulated and is contained in the *Economic Inquiry Report*, the *Syndicated Exclusivity Report*, and the accompanying *Notice*. These documents fully explain the methodology and illuminate the criteria which were used to evaluate the public interest quotient of these rules. Thus, we have exposed for public scrutiny all the information which can be regarded as critically relied on in adducing our tentative conclusions. When we were presented with the argument that certain parties considered the time frame for comments and reply comments too short, we responded by granting to all interested persons additional time within which to complete their filings.[11]

8. Having provided numerous opportunities to comment at the various stages of this proceeding, we are now presented with the claim that we should vary traditional procedure because the procedures provided thus far are less than satisfactory and that an evidentiary hearing, limited in nature, is the only way to assure the soundness of the Commission's proposals. Those who seek the new procedure, however, do not offer a satisfactory explanation for their particular preference for this and only this procedure. For example, the joint motion indicates several questions which arguably could be explored in the requested evidentiary hearing process and cites what are characterized as serious questions raised in the *Reports*. It does not tell us

[10] Indeed, we also considered two separate petitions for rulemaking which involved matters deemed so closely related to those under review in these dockets as to warrant their consideration with them. We subsequently addressed the merits of these petitions, following notice and comment, in our *Notice* adopted April 25, 1979, and specifically incorporated a significant aspect of one of the proposals to provide an opportunity for further comment even though these matters were brought to the Commission shortly before scheduled consideration of action in Dockets 20988 and 21284.

[11] Specifically, our *Order in Dockets 20988 and 21284*, FCC 79-426, of July 12, 1979, which denied the evidentiary hearing request as premature, extended the time for filing initial and reply comments for an additional sixty days. Most recently, a further period of time was provided to allow interested persons the opportunity to comment on a new study by Rolla E. Park, Rand Corporation, entitled "Audience Diversion Due to Cable Television: Response to Industry Comments." *Order in Dockets 20988 and 21284*, adopted December 10, 1979.

why the present procedures, which traditionally have been used, are inadequate to address these concerns.[12] At a minimum, we would expect, and indeed should require, that a party wishing to challenge proposed agency action make a "proffer of the specific issues and witnesses which they [claim cannot] be explored without [hybrid rulemaking procedures]." *National Asphalt Pavement Association v. Train*, 539 F. 2d 775, 782 (D.C. Cir. 1978) and *International Harvester Co. v. Ruckelshaus, supra*, at 649. Here, there has been no demonstration that "the legislative procedures have been inadequate," *see National Resources Defense Council, Inc. v. United States Nuclear Regulatory Commission*, 539 F. 2d 824, 839 (2d Cir. 1976), or that "the Commission's disclosure of greater detail or cross-examination of the Commission's staff [is] needed to enable [petitioners] to mount a more effective argument," *see Long Island R. Co. v. United States*, 318 F.Supp. 490 (E.D.N.Y. 1970).[13]

9. We concede the importance of this proceeding to the affected industries as well as to the overall public interest. This by itself, however, does not constitute a sufficient reason for us to depart from the previous procedural practice which we have followed in rulemaking proceedings of this type. Our interest, which seems to be the same as that of the courts and commentators who have addressed this subject, is in assuring that the critical issues at stake in a particular proceeding have been carefully scrutinized and in assuring that the agency's decision making process, as consummated in the form of final agency action in the proceeding, results in principled decisionmaking and thus conforms with traditional notions of "fairness" and "due process". Contrary to the assertions made in the joint motion, these consider-

[12] The specific questions which, it is claimed, should be explored in a limited evidentiary hearing concern whether the data utilized by the Commission as a basis for the proposed recommendations are representative of the cable television and broadcast television universe, whether the methodology used is valid and has been properly applied, and whether the stated conclusions are rational and reasonable inferences from reliable and probative data. These, as well as the "serious questions" relating to impact on local stations, on non-commercial stations, service to the viewer, and impact on program supply, hardly appear to be the sort of questions which are amenable to resolution by means of evidentiary hearing. Instead, they appear to be questions which fit within the classification of matters "of policy or of broad or general fact," see Davis, *supra*, at §6.20, which are precisely the classes of questions ill-suited for the requested procedure.

[13] We denied the request for an evidentiary hearing prior to submission of comments on the basis that, once comments had been filed, we would be in a better position to judge the appropriateness of this procedure in the instant proceeding. We had anticipated that those parties continuing to urge the necessity of oral as opposed to written comment procedures would be in a better position after receipt of all comments and the information gleaned from them to set forth the issues to be explored and the reasons why these issues could not satisfactorily be explored through written comments. No further effort to do this has been undertaken. We do not believe the request before us is the "circumscribed and justified request[s]" of the type referred to in *International Harvester Co. v. Ruckelshaus, supra*, at 631.

ations do not turn on the presence or absence of one particular procedural device such as cross-examination but instead, on the totality of the agency's decision-making process. On the appropriateness and desirability of cross-examination for this proceeding, we have previously alluded to some critical thought on its value in informal rulemaking matters as well as to the less than ideal experience with its use in different contexts. *See* also Davis, *supra*, at §6:21 for discussion of cross-examination under recent statutes. We are of the opinion that to pursue the procedural course advocated at this stage would not be conducive toward our reaching an ultimate public interest determination in this matter because the cost of such a process both to the Commission and to outside parties, and most importantly to the public, both in terms of direct outlays and in terms of delay, would far outweigh any reasonably foreseeable benefits.[14] In our denial of the Joint Motion, we ascribe to the views expressed by the court in the *International Harvester* case where, after enumerating the difficulties attending the cross-examination process, the court said that "there is not insignificant potential for havoc." 478 F. 2d at 631. There, the court added that "[w]hat is most significant is that these complications are likely to be disproportionate to the values achieved." *Id.*[15]

10. Our denial of the request for evidentiary hearing today is not without precedent in the communications policy field. Even in cases where under the Communications Act an "opportunity for hearing", or equivalent language, is specifically provided in contrast to notice and comment rulemakings such as this one under the Administrative Procedure Act, the courts have held that an oral evidentiary hearing is not required. *See, e.g., Bell Telephone Company of Pennsylvania v. FCC*, 503 F. 2d 1250 (3rd Cir. 1974), *cert. denied* 422 U.S. 1026 (1975), where the Third Circuit Court of Appeals stated that "merely because the policy questions at issue are of special importance or complexity" does not mean that an evidentiary hearing must be held. *Id.* at 1266.[16] In that case, the petitioners claimed that the existence of material

[14] We believe that incessant delays can be equally as abrasive to fundamental notions of "fairness" and "due process" because such delay disserves the public.

[15] Other statements have been made to the same effect. e.g., Chief Judge Bazelon, in the earlier mentioned *Natural Resources Defense Council* case, stating that reviewing courts should be reluctant to impost particular procedures on agencies, and that "requiring cross-examination in a rulemaking proceeding is radical therapy, which may cause the patient to suffer a slow, painful death." 547 F. 2d at 655 (Separate statement of Chief Judge Bazelon). In the same case, Judge Tamm, expressing skepticism over imposing "increased adversarial procedures in excess of those customarily required," intimated that a limited right of cross-examination affords little relief other than "delay and a tool with which to bargain for substantive concessions" and that the ultimate benefit derived in many cases is "that the right of cross-examination at a rulemaking proceeding frequently is better to have and be denied than to utilize." 547 F. 2d 660 n. 7 (Concurring statement of Judge Tamm).

[16] *See also National Air Carrier Association v. Civil Aeronautics Board*, 436 F. 2d 185, 194 (D.C. Cir. 1970), where the court stated that "[t]he fact that these questions are

factual issues required adjudicatory proceedings in the form of an evidentiary hearing. Other cases involving communications policy are of the same import. *See, e.g., RCA Global Communications, Inc. v. FCC*, 559 F. 2d 881 (2d Cir. 1977), where the Second Circuit Court of Appeals held that the agency's failure to provide an evidentiary hearing was not improper even though Section 222(e)(3) of the Communications Act provided for "a full hearing" and even though it involved a change in policy "which will affect many parties and which is based on complicated economic considerations." *Id.* at 887. The Court stated that "the requirements of a 'full hearing' " was satisfied "by a 'notice and comment' procedure, aided by a lengthy statistical study, and with many written submissions by each of the immediately interested parties." *See also American Telephone and Telegraph Company v. FCC*, 572 F. 2d 17, 22 (2d Cir. 1978), where the court held that "a dispute concerning the economic impact of the removal of resale and sharing restrictions on both carriers and the public" does not require "a trial-type hearing."[17] The court's decision concluded that a "trial-type hearing was not required to consider the economic impact of the Commission's decision" and that the hearing requirement of Section 205(a) of the Act was satisfied by notice and comment procedures. *Id.* at 23. In sum, we conclude that no sound basis exists for the type of procedure requested here.

Oral Argument

11. In the event that the request for an evidentiary hearing is denied the National Association of Broadcasters has requested that a more conventional oral argument be held.[18] NAB indicates in its request that oral argument would be appropriate in this proceeding because any consideration of possible changes in the distant signal and syndicated exclusivity rules merit the fullest and fairest Commission review and because oral argument in a proceeding in which the record is voluminous would focus the Commission's attention on the most critical issues and the most compelling arguments of the various interested parties. It suggests that oral argument not be held until (1) the Commission has completed all the research it has undertaken or

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difficult and important, however, does not mean that an evidentiary hearing is an essential prerequisite to their satisfactory resolution." *But see American Airlines, Inc. v. CAB*, 359 F. 2d 624, 631 (en banc 1966), *cert. denied* 385 U.S. 843 (1966).

[17] The court noted that "[t]he issues involves what Professor Davis calls 'legislative' rather than 'adjudicative' facts. It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearing." 572 F. 2d at 23, quoting *American Airlines v. CAB, supra*, at 633.

[18] NAB was also one of the original parties to the joint motion request for limited evidentiary hearing. Subsequent to our denial of the joint motion and grant of extension of time to file initial and reply comments to September 17 and October 17, 1980, as requested by NAB, it filed this request. On January 10, 1980, in additional comments filed in this proceeding, it reiterated its request for limited evidentiary hearing thereby joining in with MPAA.

commissioned and placed in the record and (2) the Commission's staff has prepared and submitted its recommendations to the Commission.[19]

12. We agree with the general thrust contained in the request that the matters under consideration in this proceeding are of considerable importance and accordingly should receive the fullest and fairest consideration by the Commission. We are not convinced, however, that oral argument is an essential or indispensable prerequisite in order to assure this.[20] We believe that many of the reasons which apply to our decision to deny the request for evidentiary hearing apply as well to this request. As indicated previously, we have provided interested persons ample opportunity to inform us of their positions including the opportunity of apprising us of what in their estimation are the most critical issues and questions in this proceeding. We seriously doubt that the comments of interested parties in this proceeding have fallen short in this regard. Moreover, we have not been presented with persuasive reasons why the benefits to be gained from this procedure could not or have not been achieved through the notice and comment procedure. On the contrary, we believe that the arguments in support of the request indicate that oral argument might contribute toward further delay rather than elucidation and final resolution of the matters in Dockets 20988 and 21284. Oral argument would merely add to a record which, by NAB's own admission, is already "voluminous". Oral argument would not aid the Commission's deliberations because the critical issues have already been clearly identified and extensively debated in the written record; nor would oral argument provide any meaningful assistance to the staff, because the proceeding would be held *after* the staff had already prepared its recommendations.[21] Accordingly, we are not convinced that scheduling of oral argument would achieve something which has not already been achieved through the extensive comment procedure already employed in Dockets 20988 and 21284 or that it would constitute a positive contribution toward a public interest resolution of this proceeding.

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[19] NAB also appears to prefer that if the staff does not complete preparation of its recommendations by the date set for oral argument, the oral argument be postponed and rescheduled to permit submission of the staff's recommendations prior to oral argument.

[20] Section 553(c) of the Administrative Procedure Act provides in pertinent part that "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation" which indicates to us that oral presentation or oral argument is not mandatory but rather discretionary on the Commission's part.

[21] To the extent that such a procedure would contribute toward delay of a final decision in this matter, we note that the United States Court of Appeals for the D.C. Circuit stated in *MCI Telecommunications Corp. v. FCC*, Case No. 79-1119, slip opinion at 43 (D.C. Cir. April 2, 1980), "delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors, or the public of rights and economic opportunities without the due process the Constitution requires." (footnote omitted).

Accordingly, IT IS ORDERED, That the "Joint Motion for Revision of Procedures" as resubmitted IS DENIED.

IT IS FURTHER ORDERED, That the request for oral argument filed November 7, 1979 by the National Association of Broadcasters IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

CATV Carriage
CATV Carriage Distant Signal Rules
CATV Program Exclusivity, Syndicated Programming
Retransmission
Rules, Amendment Of

Order deletes cable television distant signal and syndicated exclusivity rules. Criterial evaluated before eliminating these rules were consumer welfare, distributional equity, and external effects. Proposal to adopt cable retransmission consent is beyond Commission's statutory authority. 20988.

FCC 80-443

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Cable Television Syndicated Program Exclusivity Rules	Docket 20988 Rm-2721
In the Matter of	
Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television	Docket 21284 Rm-2919 Rm-3324 Rm-3346

REPORT AND ORDER

(Adopted: July 22, 1980; Released: September 11, 1980)

BY THE COMMISSION: COMMISSIONERS LEE, QUELLO AND WASHBURN DISSENTING AND ISSUING STATEMENTS; COMMISSIONERS FERRIS, CHAIRMAN; FOGARTY AND BROWN ISSUING SEPARATE STATEMENTS; COMMISSIONER JONES CONCURRING AND ISSUING A STATEMENT.

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I. Summary and Introduction

Summary of Decision

1. The basic question presented in this proceeding is whether the Commission should continue in force rules that restrict the carriage of distant television broadcast signals by cable television systems. Our conclusion is that these rules do not benefit the public and should be eliminated.

2. Existing cable television signal carriage rules limit the number of distant television signals that cable television systems may distribute to their subscribers. Syndicated program exclusivity rules also require the deletion of individual programs from distant signals that are otherwise available for carriage. The rules in question are found in

47 C.F.R. Part 76, including particularly Sections 76.59, 76.61, 76.63 and 76.151–76.161. These rules were adopted in the Commission's 1972 *Cable Television Report and Order* [1] and, although some changes in them have been made, they retain the basic form given them at that time.

3. Almost four years ago the Commission initiated a formal inquiry to review the purpose, effect, and desirability of the syndicated program exclusivity rules.[2] This was followed by a similar proceeding to review the distant signal carriage rules.[3] Detailed economic reports reviewing the functioning of these rules and their impact on the public's television service were adopted by the Commission in 1979. These *Reports* concluded that the television service received by the public would not be impaired and would in some respects be significantly improved by the elimination of these regulatory constraints.[4] Based on these findings, a *Notice of Proposed Rule Making* was issued proposing the elimination of the distant signal and syndicated program exclusivity rules.[5] The purpose of this *Notice* was to permit interested persons an opportunity to participate in the rule making process, to comment on the research and analysis presented by the Commission, and to set forth relevant information of their own relating to the rule making proposal.

4. We have now carefully reviewed the comments received. This review persuades us that the proposal was sound and should be adopted. We have also reviewed proposals submitted to us for alternative rules that would require cable television system operators to obtain individual permissions, in the form of retransmission consents, for the distant television broadcast stations carried. This proposal is, we believe, essentially related to copyright considerations and is beyond the authority of the Commission to adopt. Based on the wealth of information and analysis now before us, we believe the rule changes proposed should be adopted and that this will significantly benefit the public with no undue risk of injury to the broadcast service the public now receives.

General Background

5. Commercial television broadcasting in the United States is generally recognized to be highly remunerative. It is also a field in which competition is intended to be the general rule, with each

[1] 36 FCC 2d 143, 37 Fed. Reg. 3252 (1972).

[2] *Notice of Inquiry in Docket 20988*, 61 FCC 2d 746, 41 Fed. Reg. 50055 (1976).

[3] *Notice of Inquiry in Docket 21284*, 65 FCC 2d 9, 42 Fed. Reg. 32825 (1977).

[4] *Report in Docket 20988*, 71 FCC 2d 951 (1979) ("Syndicated Exclusivity Report") and *Report in Docket 21284*, 71 FCC 2d 632 (1979) ("Economic Inquiry Report").

[5] *Notice of Proposed Rule Making in Dockets 20988 and 21284*, 71 FCC 2d 1004, 44 Fed. Reg. 28347 (1979).

individual broadcaster left to "survive or succumb according to his ability to make his programs attractive to the public."[6]

6. Although competition is the general rule, our system of broadcasting places significant weight on the value of "localism"[7] and on the understanding that broadcast station licensees are public trustees that must serve the "public interest, convenience, and necessity" even if, in particular circumstances, that does not comport with their own immediate economic interests.[8]

7. The juxtaposition of these considerations has created a certain tension in the law as it is applied to broadcasting. Because competition is the general requirement, the Commission is not to be concerned with the effects of competition on station revenues or profits. It must be concerned, however, if there is evidence that competition is so destructive or debilitating that it results in a loss of broadcast service to the public.[9]

8. The Commission's historic concern in its regulation of the cable television industry has been that the additional viewing options made possible by the expanded channel capacity of cable systems and their ability to introduce distant signals that would not ordinarily attract viewers in the local market, introduced competition that was likely to be both inequitable and destructive. When first presented with this issue, the Commission found in the available evidence no basis for action.[10] However, in the years that followed, the potential for injury was felt to outweigh the lack of clearly defined evidence and the regulation of cable television operations was commenced.[11] Although the Commission's authority to act in this manner was not specifically set forth in the Communications Act, the Commission's general authority was found by the Supreme Court to be broad enough to authorize this regulatory activity.[12]

9. The Commission's assumption of regulatory responsibility in this area was at each step accompanied by frank admissions that the facts underlying its theoretical concerns were not fully understood. In 1965, certain regulations were applied to cable television indirectly but the Commission found it "impossible, with the data at hand, to isolate reliably the effects of CATV competition from all the other factors

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[6] *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1970).

[7] *Sixth Report and Order in Dockets 8736 et al.*, 41 FCC 148, 172 paras. 79 and 124 (1952).

[8] Section 309, Communications Act of 1934, as amended, 47 U.S.C. §309; *Enbanc Programming Inquiry*, 44 FCC 2303 (1960).

[9] *FCC v. Sanders Bros. Radio Station, supra; Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958).

[10] *Report and Order in Docket 12443*, 26 FCC 403, 24 Fed. Reg. 3004 (1959).

[11] First indirectly, *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), and then directly, *Second Report and Order in Docket 14895 et al.*, 2 FCC 2d 725, 31 Fed. Reg. 4540 (1966).

[12] *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

which operate to produce particular financial results in differing settings."[13] In 1966, the Commission adopted new rules for cable television operations, but stated, with respect to adverse impact on broadcast service, that "we cannot make that judgment on the record now before us" and that "[i]t may be that CATV, if allowed full, unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programming to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire nation.*** It is, we think, time to get the facts . . . ."[14] Again in 1972 the Commission found itself faced with conflicting evidence and again felt compelled to act in the face of inherent uncertainties and with no ability to forecast precisely how cable was likely to develop.[15] The history of our regulatory involvement with cable television is set forth in some detail in Appendix A to this document. This *Report and Order* involves a major alteration in our cable television rules and it is therefore important that the nature of the change from past policies be clearly understood so that it is evident that "prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corporation v. FCC*, 444 F. 2d 841, 852 (1970). This history should also demonstrate that, because of their unique origin, the present rules may not be entitled to the benefit of the doubt sometimes accorded the *status quo*.

The Existing Rules

10. The signal carriage rules are basically of four types:
- rules that mandate carriage of particular signals,
- rules that limit the number of distant television broadcast signals that may be carried,
- rules that require the deletion of particular network or syndicated programs from signals that are carried, and
- rules that require deletion of particular sports programs from signals that are carried.

In this proceeding we are focusing our attention only on the distant signal and syndicated program exclusivity rules. Changes in the

[13] *First Report and Order in Dockets 14895 and 15233*, 38 FCC 683, 30 Fed. Reg. 6038 at paragraph 68 (1965).

[14] *Second Report and Order in Dockets 14895 et al., supra* at paragraph 155 (1966). *See also Suburban Cable TV Co., Inc.*, 11 FCC 2d 604, 606 (1968) (separate opinion of Commissioner Loevinger).

[15] *Cable Television Report and Order, supra*, at paragraph 70. The rules adopted in 1972 were based in part on an industry "Consensus Agreement" which accounts for the lack of economic analysis of certain parts of the rules. See *The Role of Analysis in Regulatory Decisionmaking: the Case of Cable Television*, Lexington Books, 1973, page 26, where it is suggested that the parties' acceptance of the compromise was made "in a virtual vacuum."

mandatory carriage, sports blackout, and network nonduplication rules have been explicitly excluded from review in this proceeding.[16]

11. The distant signal carriage rules generally vary the number of distant signals that cable systems may carry based on the size of the television market (35 mile zone) in which the system is located.[17] Systems that are not located within a market, as that term is defined by the rules, are not subject to any limits. Those in the smaller television markets (below the 100 largest markets) may carry no distant independent or network television stations if each of the three national television networks has a local affiliate and one or more independent stations exist in the market. If there is no local independent station or one or more of the national networks do not have local affiliates, then distant station signals may be imported so that subscribers have at least one independent station signal and one station affiliated with each of the national networks.

12. Cable television systems in the 100 largest television markets are permitted to carry enough local and distant signals to provide subscribers with at least two independent television stations and one station affiliated with each of the national television networks. Moreover, under these rules, at least two distant independent signals may always be carried and, in the 50 largest markets, if there is no local independent station, three distant independent stations may be carried.

13. All cable television systems may also carry specialty stations (stations whose programming, on an all day basis and in prime time, is at least one-third foreign language, religious, and/or automated) and non-commercial educational stations in the absence of justified objection by local educational stations. Smaller systems (those with under 1000 subscribers) are exempt from these limitations.[18]

14. The syndicated program exclusivity rules limit the carriage of

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[16] *Notice of Proposed Rule Making in Dockets 20988 and 21284, supra*, para. 5 at 1006.

[17] The terms "local" and "distant" are used loosely for purposes of this discussion. Generally speaking a local signal is one that is receivable over-the-air by television viewers and a distant signal is one that cannot be so received. The dividing line is not nearly as clear as this suggests, however, and entire proceedings have been devoted to adding greater definition to these terms. See, for example, *Report and Order in Dockets 16004 and 18052*, 53 FCC 2d 855 (1975) (involving television station contour definitions). The difficulties in defining these terms precisely are in part technical and in part a confusion over the question of whether, in a particular situation, a technical, economic, or audience survey focus is appropriate. A continuation of the confusion over the correct definition continues in some of the comments filed in response to the *Notice* in this proceeding. These comments are addressed in detail below.

[18] This description of the rules, it should be recognized, is somewhat oversimplified. Other provisions of the rules, for example, provide for the carriage of additional stations late at night (*Report and Order in Docket 20028*, 46 FCC 2d 446, 39 Fed. Reg. 33528 (1974)), for the carriage of additional network news programs (*Report and Order in Docket 19859*, 57 FCC 2d 68, 41 Fed. Reg. 1063 (1976)), and for the carriage of additional UHF stations (*Report and Order in Docket 20496*, 65 FCC 2d 218, 42 Fed. Reg. 36831 (1977)). Specific provision is also made for *ad hoc* variances from the

individual programs on signals that are otherwise available for carriage under the distant signal carriage quotas. These rules apply only to cable television systems in the fifty largest and second fifty largest television markets. In their application to the fifty largest markets, they require cable television systems, at the request of local television stations, to delete all programs from distant signals that are under contract for television exhibition to local stations. The rules also permit the owners of television programs to require deletion of programs from distant signals for a period of one year after an individual program is first sold for television broadcast anywhere in the United States.

15. In the second fifty television markets, television stations that have programs under contract are also permitted by the rules to have these programs deleted from distant signals carried by cable television systems. The rights provided by the rules, however, expire at the end of specified time periods or on the occurrence of a specified event: (1) for off-network series, exclusivity commences with the first showing and lasts until the completion of the first run of the series, but no longer than one year, (2) for first-run syndicated series, it commences with the first showing and runs for two years thereafter, (3) for feature films and first-run non-series syndicated programs, it commences with the availability date of the program and extends for two years thereafter, and (4) for other types of programs, it commences with the purchase and continues until completion of the first run but, in no event, beyond one year.

16. These rules generally require that the distant signal programs involved be deleted regardless of when that particular program is scheduled for showing by the local market station. However, in the second fifty markets, if the distant syndicated program is broadcast in prime time it need not be deleted unless the market station seeking protection is also going to broadcast that program in prime time. The rules also permit cable television systems to substitute other distant signal programs, if they are available, in place of those that must be deleted under these rules.

17. Neither the distant signal nor the syndicated exclusivity rules, when they were adopted, were applied retroactively. That is, notwithstanding these regulations, cable systems carrying distant signals prior to 1972 were permitted to continue carriage of those signals. Moreover, programs on signals carried prior to 1972 were generally not subject to deletion under the syndicated program exclusivity rules. Both of these "grandfathering" provisions are of particular significance in the context of this proceeding because they make it possible to view the operations of a class of cable systems that are in many respects the equivalent of unregulated operations due to their operational status at

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rules in situations where their general application is found to be inappropriate. 47 C.F.R. §76.7.

the time our regulation was commenced. As will be discussed in greater detail below, this ability to observe the operations of unregulated systems is a significant aid to us in determining the impact of a more general deregulation of the cable television industry.

Origin of the Present Proceeding

18. These rules have increasingly been the subject of criticism in recent years.[19] In part this criticism is a reflection of the general disfavor into which regulations limiting competition have fallen. The perception that these rules were in need of re-evaluation, however, is also the consequence of: (1) the availability of more complete and detailed audience survey data reflecting television viewing patterns in the homes of cable television subscribers,[20] (2) the increasing financial strength of television broadcasters even in the face of increased cable television competition,[21] and (3) the resolution in 1976 of the status of cable television under the copyright laws by passage of the Copyright Revision Act.[22] In recognition of these changed circumstances and motivated by our own statutory responsibility to re-assess on a continuing basis the public interest value of our policies and

[19] See, for example, Staff of House Communications Subcommittee, 94th Cong. 2d Sess., *Cable Television: Promise Versus Regulatory Performance* (Subcommittee Print 1976).

[20] The national audience rating services for many years made no separate accounting for viewing in cable homes and, even after they first commenced making separate viewing data available, the widely scattered nature of cable television across the country and the relatively small number of households involved made it difficult to obtain statistically reliable samples.

[21] Annual broadcast station financial reports to the Commission reflect that, since 1972, when the existing rules were adopted, total television station revenues have increased by 183 percent. This occurred notwithstanding the fact that the cable television subscribing population increased by approximately 150 percent. During this period and controlling for inflation the profits of the average independent station rose more than tenfold.

[22] General Revision of the Copyright Law, P.L. 94-553, 17 U.S.C.Sections 101 *et seq.* (1976). Cable system operators historically have made use of both local and distant television broadcast signals without any direct nexus or financial responsibility either to the originating station or the creators of the programming broadcast. Questions as to the lawfulness of this situation and the appropriate policy that should be applied were debated almost from the very start of the cable industry. *See* Smith, "The Emergence of CATV: A Look at the Evolution of a Revolution," 58 *Proceedings of the IEEE* 967 (July 1970). In the late 1950's and early 1960's cable operators were charged with unfair competition, unjust enrichment, and tortious interference with contract rights—charges which the courts ultimately rejected in *Cable Vision, Inc. v. KUTV, Inc.*, 335 F. 2d 348 (9th Cir., 1964) *cert. denied sub nom. Klix Corp. v. Cable Vision, Inc.* 379 U.S. 989 (1965). In the late 1960's and early 1970's, the Supreme Court found in two separate proceedings that cable television systems were not violating the 1909 Copyright Law by carrying either local or distant television broadcast signals. *Fortnightly Corporation v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974). This dispute was resolved by the Congress in 1976 with the passage of the new copyright act.

regulations[23] we issued in November of 1976 our *Notice of Inquiry in Docket 20988, supra*, "commencing a detailed review of the rules that limit cable television carriage of syndicated programs on distant signals" and in June of 1977 our *Notice of Inquiry in Docket 21284, supra*, which commenced "a more general review of the economics of the relationship between television broadcasting and cable television."

19. In order to permit the fullest possible participation, the comment periods in each of these proceedings were extended. Additional studies undertaken by the Commission's staff were placed in the record of Docket 21284 and made available for public comment and additional outside contract research was undertaken. Voluminous comments were received in response to each of these notices. Our examination of the materials filed and our own research efforts led to our *Syndicated Exclusivity* and *Economic Inquiry Reports*. Each of these *Reports* reached the conclusion that the rules under review were having negative rather than positive consequences in terms of the television service received by the public and that the rules could be eliminated without undue risk of injury to the public.

20. Based on these *Reports*, and with their findings incorporated by reference, we issued a *Notice of Proposed Rule Making* which invited public comment on the substance of each of the *Reports* as well as on the general conclusion contained therein to the effect that the Commission could proceed to eliminate these two sets of rules without incurring any considerable risk of injury to either cable or non-cable viewing members of the public.[24]

21. To obtain a fuller appreciation of those industries whose economic incentives, as tempered by regulation, have a major influence on the video services available to our society, we provided an overview of the television broadcasting, cable television, and television program production industries. *Notice*, Paras. 8–43, *supra*, at 1006–1021. We observed that the "competitive juxtaposition of these important elements of our economy's communications sector has produced numerous demands on the Congress and this Commission for the

[23] It should also be noted that the Commission is obliged by the decision of the D.C. Circuit Court of Appeals in *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979) to reassess those of the rules which were based on the 1971 industry "Consensus Agreement" that is described in the *Cable Television Report and Order, supra*.

[24] In an effort to assure interested persons the fullest possible opportunity to participate in the present phase of this proceeding we extended the original time frames for the submission of comment and reply comment, *Order* adopted July 12, 1979, FCC 79–426, and provided further opportunity for comment in a new contract study undertaken at our request and deemed to be of relevance to the proceeding. The Consumer Assistance Division of the Commission's Office of Public Affairs distributed notice of the pendency of the proceeding widely to public and consumer groups with a potential interest in the outcome of the proceeding in order to promote the widest public participation in the decisional process.

imposition of economic regulation." Para. 44, *id.* at 1020. We strongly emphasized, however, as we have on previous occasions[25] that the Commission's underlying concern in the regulation of both broadcasting and cable television is "with the quantity and quality of video and telecommunications service that the public receives" and not, as some might erroneously perceive, "with shifting or safeguarding revenues or profits, or with the success or failure of any particular firm, industry, or technology." Para. 7, *id.* at 1006.

Criteria for Evaluation

22. In the course of analyzing these rules, both in the two *Reports* and in the *Notice*, we reviewed in considerable detail the historical rationale on which the Commission had premised these regulations, and set forth criteria on which to judge their continuing effectiveness. The restrictions historically were rationalized on one of the four following grounds:

(1) as a means of assuring the public against a net loss of television service as a consequence of cable-created audience losses which it was theorized would undermine the economic support of television stations and in the process deprive the poor and those living in areas unserved by cable or video services;

(2) as necessary to preserve the broadcast television allocations policy with its emphasis on local service;

(3) as a means of eliminating what was perceived to be the unfair means by which cable systems competed with local broadcasters, and

(4) as necessary to assure against injury to the continued production of television programming. Para. 45, *id.* at 1021.

23. In re-evaluating the facts and policies underlying the cable television distant signal and syndicated program exclusivity rules we identified three criteria by which it seemed to us appropriate to judge the effects of various policies on the welfare of consumers of video services. These three criteria, which roughly correspond with those considered and used in earlier Commission decisions involving cable television but using somewhat more precise economic terms, relate to: (1) consumer welfare, (2) distributional equity, and (3) external or spillover effects. These terms are described in some detail in our *Economic Inquiry Report, supra*, at 636–639.[26]

24. Briefly, consumer welfare is grounded in our responsibility to assure "efficient" communications service, 47 U.S.C.Sec. 151. It is

[25] *See, e.g., Cable Television Report and Order, supra*, at 134 n. 32 where we stated that "we are guided by the standard of what will best serve the public interest and not by a desire to protect any industry from the impact of new technology."

[26] See also *Report in Docket 20988, supra*, at 955–956 and *Notice of Proposed Rule Making in Dockets 20988 and 21284, supra*, at 1023–1027.

reflected in our concern with assuring that policies adopted tend toward the creation of a communications system that increases the net video service supplied to the public or otherwise maximizes the value the public receives from society's overall investment in the video distribution system.

25. Distributional equity is related to the allocation between various segments of society of the costs and benefits of a particular policy. Cable television service, in contrast with broadcast service, must be paid for directly and is generally not available to residents of very low population density areas or urban centers where demand is low and construction costs are high. Thus, even if the effect of a policy change to consumers as a whole proved beneficial, some groups might be less well off as a consequence of that policy change.

26. External or spillover effects are related to our concern with localism in broadcasting and the obligations of broadcasters to inform the public. Since the true value of local news and public affairs programming may not be reflected in the number of individuals who view it or the value they place on it but rather in the value it has to our society as a whole and especially to the functioning of our democratic institutions, it may be regarded as an "externality" that needs to be accounted for in regulations since this extra or external value may not be completely accounted for by ordinary market institutions.

27. To the extent that the rules had in the past been based on a concern with "unfair" competition, we noted that this appeared to be a consideration that was coextensive with the issue of the cable industry's copyright liability. *Notice*, *supra*, at 1025. Moreover, we noted the statement of the Court of Appeals in *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, 42 (D.C. Cir. 1977), *cert. denied* 434 U.S. 829 (1977) that "[W]e do not perceive any public benefit to be achieved by hobbling cable television to correct the sort of unfair competition alleged by the Commission."

Basis for Rulemaking Proposal

28. Comparing the facts adduced in the two inquiry proceedings with the criteria set forth for re-evaluating the rules, we concluded that "none of the four problems which these rules ostensibly address in fact exists." (footnote omitted) Para. 63, *Notice*, *supra*, at 1026. We concluded that the distant signal and syndicated exclusivity rules themselves caused "significant sacrifices in consumer welfare." *Id.* We found that no significant adverse consequences would befall the ability of television broadcast stations to provide local programming if the rules were eliminated and that the likelihood of any viewers being significantly harmed from elimination of the rules was remote. *Economic Inquiry Report* at paras. 140–145, *Syndicated Exclusivity Report* at paras. 94–96. We noted that whatever effects deletion of these rules might have on program supply was derivative of the effects on television broadcasting and that the effects were found to be

minimal. *Syndicated Exclusivity Report*, paras. 43, 45, 72–88 and 95. We also found no evidence to indicate that the interests of consumers of video services would be inadequately served by the "markets linking consumers with the cable, broadcasting and program production industries" if we eliminated these rules. *Notice* at para. 57. Finally, we concluded clear benefits would result from a relaxation of these rules, including "an increase in the opportunity for diversity and competition both in the economic marketplace and in the marketplace of ideas." *Economic Inquiry Report* at 143. "The benefits of our current rules are small," we said, "and . . . these benefits go mainly to broadcasters whose incomes thereby rise faster than they otherwise would. The costs of our current regulations fall on existing and potential cable subscribers, each of whom is denied some increase in freedom of choice. The costs of our present policy also fall on society as a whole, to the extent that we have inadvertently stifled some participants in the system of freedom of expression." *Id.* at para. 144. Accordingly, since we found no material benefits gained from the continuance of these rules, we issued our *Notice of Proposed Rule Making* proposing their elimination.

Alternative Rule Making Proposals

29. We also considered in our *Notice* two additional matters brought to our attention in the form of petitions for rulemaking. The first of these matters (RM-3324) was filed by the National Telecommunications and Information Administration of the United States Department of Commerce. It requested that we adopt a regulation that would compel new cable systems or cable systems expanding existing operations to obtain the consent of the originating station if they wished to distribute the non-network programs of that station. It was urged that this "retransmission consent" policy would achieve a marketplace solution to cable carriage of distant signals since such a proposal would leave distribution of this type of programming to marketplace forces instead of governmental intervention. NTIA emphasized that complete deregulation of distant signal carriage by the Commission would merely place increased emphasis on the Copyright Royalty Tribunal (a separate governmental body whose responsibilities include establishing the level of copyright fees paid by cable television systems for the carriage of distant signals).

30. We carefully examined the petition and, on balance, believed that it should be denied. We stated that to the extent that the proposal recommended that we refrain from deregulation of distant signal carriage and impose stricter syndicated exclusivity requirements on cable systems in the second fifty major television markets (also an aspect of the proposal) it involved "considerably more which appears less consistent with reliance on the marketplace." Para. 78, *id.* at 1033. Moreover, we added that to the extent the proposal favored deregulation only if accompanied by a retransmission consent policy and would

continue to place distant signal carriage restrictions and syndicated program exclusivity restrictions on cable systems and their subscribers, "it is inconsistent with our conclusions, enunciated in the *Report*, clearly endorsing increased competition in the marketplace." Para. 79, *id.* at 1033–1034. As we had noted:

> a major objective of these proceeding was to determine from available economic evidence whether Commission regulation of the competition between cable and television broadcasting continued to be supportable on public interest grounds or whether a marketplace approach would produce better results for consumers of video services. The Reports adopted today indicate quite clearly that increased competition in the marketplace for video entertainment and information services would not adversely affect consumers of video service. Para. 81, *id.*

31. Further, we pointed out our "previous unsuccessful effort to implement a retransmission consent program" and that in light of this, we were "extremely reticent to forbear from proceeding on the evidence and recommendations" unless compelling evidence could be shown "that substantial injury now or in the foreseeable future would occur to the public." Para. 80, *id.* at 1034. We added that "[i]f our investigation of marketplace opportunities, deficiencies, and supplements so warrants," we were confident that we would "be able to take appropriate action at a later time." *Id.*

32. Nevertheless, we expressed our desire for "a market solution to the problems of compensating owners of programming materials" for their use by others. Para. 81, *id.* We pointed out that the retransmission consent proposal, as well as the existing compulsory license system, "prejudge the type of market institutions that can best deal with the protection of equities" and stated that our preference would be to allow the marketplace the opportunity to work and impose regulation only if it was shown that the marketplace would not work. *Id.* We therefore invited comment "on how the markets in program rights might develop, and what actions, if any, the Commission can legally take that would serve that end." *Id.* We expressed the view that "we should examine independently the retransmission consent aspect of the proposal" insofar as it was not contrary to the approach we proposed by reasons of our findings, and, accordingly, we solicited comment on it as well as "on preretransmission notification and any other way to allow the market process to work with the least amount of intervention." Para. 82, *id.* at 1035. We pointed out that our rejection of the petition on policy grounds avoided the necessity of our resolving the jurisdictional question posed by it. But to facilitate "a full discussion of what options we might have to encourage marketplace solutions in lieu of governmental regulation," we set forth some of the arguments which might lead us to believe that we do not have jurisdiction to adopt proposals such as the one embraced by the petition.

33. The other matter presented to us was a petition for rulemaking (RM-3346) from the National Association of Broadcasters which

requested the Commission to commence rulemaking to consider the adoption of rules to ensure that the development of "superstations" does not result in harm to local broadcast service. We carefully examined the petition and related comments and reached the determination that no evidence existed to show that "a regulatory problem either now exists or is being fomented" which would justify a departure from our decision in *Memorandum Opinion and Order in RM-2952*, 68 FCC 2d 57 (1978), less than a year earlier, in which we declined to restrict carriage of television broadcast signals distributed to cable systems by means of satellite communication. Para. 104, 118, *id.* at 1043, 1050. We concluded that it would be inappropriate to halt the development of new video opportunities such as those created by satellite technology "unless it can be clearly shown that the detriments to the public . . . outweigh the benefits to be derived by consumers." Para. 125, *id.* at 1053.

34. In conclusion, we stated that "we have before us a wealth of information and analysis" from our *Reports* and that we had given careful consideration to the two additional matters brought before us. Para. 126, *id.* at 1054. We reiterated our view that the distant signal carriage restrictions could be terminated "without undue risks and that the public would benefit by this action." *Id.* We noted our intention to provide interested persons "a full opportunity to subject to detailed examination all of the policy criteria, information, and economic analysis relied on." Para. 127, *id.* We pointed out that these "regulations cannot stand unless the need therefore has been documented" and, accordingly, we urged that interested persons "address themselves to supplying the evidence on which an informed decision can be made" particularly "with respect to those issues where the relevant information is uniquely in the possession of the commenting parties." *Id.*

Response to Notice of Proposed Rulemaking

35. Approximately 90 parties filed formal responses to our *Notice of Proposed Rule Making*. For purposes of responding to these comments we have divided our discussion roughly into three parts. The first relates to the question of the impact of cable television distant signal carriage on television broadcast service to the public. The second relates to the syndicated program exclusivity rules, a matter that in part relates to distant signal impact on broadcast service, in part to the impact of distant signal carriage on the supply of television broadcast programming, and in part to other concerns relating to property rights in television programming and the functioning of the copyright laws. The third involves the retransmission consent proposal, copyright concerns, and the functioning of markets for television programming. These issues are, we recognize, intertwined both in the comments of various parties as well as in actual substance. This division, however,

provides a useful format for discussing the extensive comments received.

Preliminary Procedural Issues

36. *BURDEN OF PROOF.* Before proceeding to discuss the substantive aspects of our proposed action and the comments received in response to it, a number of the commenting parties raise a general issue which warrants consideration. These parties urge that the Commission has in this proceeding improperly or unfairly placed or shifted the burden of proof to those persons who seek retention of distant signal carriage restrictions on cable systems. WTVC *et al.*, for example, state that we have unreasonably or unlawfully imposed a substantially higher burden of proof of persuasion on those favoring a retention of the rules which the Commission cannot cure by declaring that these interests "uniquely" possess relevant information which, if not submitted, will be taken as effective default. In a similar vein, Tribune Company says that we cannot avoid meeting the burden normally placed on a proponent of a proposed action by placing the burden on the proposal's opponent if the studies have failed to support our conclusions. KOB-TV *et al.*, express the view that since neither of the *Reports* contain an order or the equivalent of final action, any alleged attempt to treat the "injury" question as resolved or to shift the burden of proof is meaningless.

37. In *Home Box Office v. FCC, supra*, at 36, the Court stated that a " 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist,' " quoting *City of Chicago v. FPC*, 458 F. 2d 731, 742 (D.C. 1971), *cert. denied* 405 U.S. 1074 (1972).

38. In *International Harvester Co. v. Ruckelshaus*, 478 F. 2d 615, 642–643 (D.C. Cir. 1973), the Court said:

> When certain material "lies particularly within the knowledge" of a party, he is ordinarily assigned the burden of adducing the pertinent information. This assignment of burden to a party is fully appropriate when the other party is confronted with the often-formidable task of establishing a "negative averment." *United States v. Denver & R.G.R. Co.*, 191 U.S. 84, 92 (1903).

39. In the *Economic Inquiry Report*, the *Syndicated Exclusivity Report*, and the *Notice of Proposed Rule Making* in this proceeding we have set forth in considerable detail the foundation for the rule change proposal. We recognize that the responsibility for making a reasoned decision rests with us and that our role is not to be that of a simple referee between the contesting interests. We have met our responsibility for adducing the evidence aggressively and, we believe, fairly. But it must be recognized that our resources are limited, especially in relation to the commercial parties involved in this proceeding. If publicly available information suggests certain facts and private parties contest these facts rhetorically but fail to provide data to support their argument, we believe we are justified in concluding that

the absent information would not have furthered these parties' position. In our *Notice of Proposed Rule Making* we sought, with a full awareness of our responsibilities under 5 U.S.C. §553 of the Administrative Procedure Act and applicable case law, to indicate that parties ought to assist us in meeting our burden if they expected us to reach a conclusion that would be sustainable under judicial scrutiny.

40. Recently, the level of specificity of record evidence to support agency rulemaking has been heightened through case law. The Supreme Court many years ago in *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) enunciated the principle that:

> Where the regulation is within the scope of authority legally delegated, presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies.

The Attorney General's Manual on the Administrative Procedure Act (1947) stated, in describing the rulemaking process, that:

> [F]indings of fact and conclusions of law are not necessary. Nor is there required an elaborate analysis of the rules or of the consideration upon which the rules were issued. *Id.* at 32.

41. The trend now, however, seems to be toward the requirement of a far more elaborate specification of the evidence:

> Once it was the general judicial practice to treat rules much like legislation. Once the question of the agency's statutory authority was settled, the main question was the traditional Brandeisian one: whether any set of facts could be imagined to support the rule in question. The decisions of our court for several years, as well as the Supreme Court's scrupulous review of the materials amassed by the ICC in the *Allegheny-Ludlum* rulemaking case, suggest to me that agencies are properly being held to a higher burden of justification. (footnote omitted).[27]

This is especially the case when, as here, First Amendment and national policies favoring competition coicide.[28]

42. Our intention in suggesting that parties wishing us to change

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[27] Wright, "Court of Appeals Review of Federal Regulatory Agency Rulemaking," 26 *Ad.Law Review* 199, 207–208 (1974).

[28] *Home Box Office v. FCC*, *supra*, at n. 67. This is not to suggest that the burden of justification is unreasonably high, for as the same Court in a succeeding case of the same name stated "we may not demand complete factual support in the record for the Commission's judgment insofar as it rest[s] upon factual determinations that '[are] primarily of a judgmental or predictive nature'; for 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.' " (citations omitted). *Home Box Office v. FCC*, 190 U.S.App.D.C. 351 (1978). As recognized by the Supreme Court, the strength of the record evidence to support an informal rulemaking action should not be confused with the statutory requirement of "burden of proof" under 5 U.S.C. §556(d) of the Administrative Procedure Act. *American Trucking Ass'n v. U.S.*, 344 U.S. 298, 320 (1953): *See also U.S. v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756–757 (1972). As to the soundness of the record evidence supporting the *Notice of Proposed Rule Making* in this proceeding, we believe that its evidential foundation was more than adequately detailed in the *Economic Inquiry Report*, the *Syndicated Exclusivity Report*, and the *Notice of Proposed Rule Making* itself.

our course and retain regulations or adopt alternative regulations provide us with evidence was simply to put them on notice that we would be unable to comply with our responsibilities under the law if we lacked evidence to support our conclusions, and that parties should assist us in obtaining that information if they were to obtain a positive response to their arguments. We do not believe that in doing this we have in any way improperly altered the burden of proof.

43. *PREJUDGMENT.* In a somewhat related argument some parties have suggested that the outcome of this proceeding has been prejudged. They complain that the consultants used by the Commission had fixed views on the subject matter which were well known before they were hired, that Chairman Ferris in a speech indicated his predisposition, and that the very content of the *Notice* suggested prejudgment by its certitude. We reject categorically all of these arguments. The consultants we hired have well established reputations in the field, have a broad knowledge of it, and appeared to us to be virtually the only individuals with the required knowledge and with national reputations who were not already under contract to one of the interested parties and were available to us. No specific improper conduct on the part of any of them is alleged. The full text of the Chairman's speech seems to us to make it absolutely clear that his mind remained open for the objective consideration of the evidence. And the material in the two *Reports* and the *Notice of Proposed Rule Making* seems to us entirely in keeping with their intended function of placing the public and interested parties on notice of the preliminary judgments reached in this matter so that responsive comments could be as focused and useful as possible.[29]

44. *DELAY.* Another general procedural point raised in some of the comments concerns requests that further action in this matter be delayed pending the occurrence of various events. For example, the Motion Picture Association of America in its comments in the syndicated exclusivity inquiry urged the Commission to make no modification in the exclusivity rules "until the Copyright Royalty Tribunal is constituted and prepared to conduct the royalty rate review that such modifications would require."[30] Others have urged that, until legislation is forthcoming, no further deregulatory action should be taken and that "the Commission should defer all action in this proceeding until such time as Congress has acted on the Broadcast/CATV provisions of the Communications Act Rewrite Bill currently pending before it."[31] Fisher Broadcasting also asks that the

[29] It should be noted that we have already issued a partial response to some of these allegations. *In the Matter of McKenna, Wilkinson & Kittner,* FCC 79-717,—FCC 2d—(1979).

[30] Motion Picture Association of America, comments in Docket 20988, April 13, 1977 at p. 8.

[31] Fisher Broadcasting Inc., comments in Dockets 20988 and 21284, March 17, 1979 at p. 2.

Commission "defer all action in this proceeding until such time as it has adopted and provided sufficient time to evaluate, *inter alia*, local origination requirements for cable television systems (RM-3430), recommendations of the UHF Comparability Task Force (Gen. Docket No. 78-391), opportunities for minorities and women to become television and radio owners and operators, etc. [sic]"[32]

45. In addition, we have been asked by Congressman Robert W. Kastenmeier, Chairman of the House of Representatives Subcommittee on Courts, Civil Liberties, and the Administration of Justice (the House Subcommittee with responsibility for copyright matters) to "delay taking any action which would disturb the delicate balance of copyright and communications policy until the Copyright Royalty Tribunal has been given an opportunity to carry out its 1980 review and Congress is in a position to respond, if necessary."[33] A number of similar requests were also received from other members of the Congress.[34]

46. Endemic to the cable television regulatory process is the problem of delay. Almost fifteen years ago it was proposed that new cable systems be prohibited from carrying distant signals for a period of five years "to allow time for UHF stations' growth and, perhaps, resolution of the copyright question."[35] When the cable television copyright issue was first before the Supreme Court, eight years before the Copyright Act was finally revised, the Solicitor General suggested to the Court that it "defer judicial resolution of the . . . case in order to allow a speedy completion of the pending legislative proceedings."[36] In 1972, the Commission was urged to delay implementing already adopted cable television rules until Congressional enactment of copyright legislation.[37]

47. This historical experience suggests to us that delay is not likely to either be as short as is initially anticipated or to improve the policy making processes in this difficult area. All of the evidence in this proceeding has been carefully accumulated and action seems to us already overdue. This is especially the case with respect to the

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[32] We were also requested to hold further oral proceedings in this Docket, which would in our view also have resulted in a further long delay in the resolution of this proceeding. That request has been the subject of a separate opinion. See *Memorandum Opinion and Order in Dockets 20988 and 21284*, FCC 80-442,—FCC 2d—(1980).

[33] Letter of March 13, 1980.

[34] On the other hand, Congressman Van Deerlin, Chairman of the House of Representatives Subcommittee on Communications, wrote the Commission before this proceeding was even commenced, stating "Now that the Copyright Revision Act is law, I urge you not to delay in your reconsideration of the syndicated program exclusivity rules." Letter of October 21, 1976.

[35] Statement of Commissioner Kenneth A. Cox, concurring in part, and dissenting in part to the *Second Report and Order in Dockets 14895, 15233, and 15971*, 2 FCC 2d 725, 817 (1966).

[36] *See Teleprompter Corp. v. CBS*, 415 U.S. 394, n. 16 (1974).

[37] *Reconsideration of Cable Television Report and Order*, 36 FCC 2d 326, 328 (1972).

syndicated program exclusivity rules which, when the *Inquiry* proceeding commenced, were said by the Commission to deserve "prompt and expeditious handling" with the Commission's consideration of the matter to be concluded by *January 1, 1978*.[38]

48. We are also required by the decision in *Geller v. FCC, supra*, to review those aspects of the rules that grew out of the 1972 "Consensus Agreement." And we have been reminded recently by the D.C. Circuit Court of Appeals in another context that "delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires." (footnote omitted).[39] We believe our obligation to proceed with the resolution of this matter is clear. We would note, however, that even proceeding as expeditiously as we are able, the rule changes adopted will not become effective much before the time when the Copyright Royalty Tribunal's initial deliberations should be complete and that development of new cable television systems, especially in the major television markets, will occur slowly and should leave ample time for legislative consideration of the changes we are adopting.

II. The Effect of Distant Signals on Television Service to the Public

49. There are in excess of 1000 television stations and 4000 cable television systems in operation, serving together almost 74 million television households in the United States. Every year financial and programming data is filed with the Commission and audience survey information is collected by commercial audience survey organizations. This information provides the raw data from which judgments can be made and estimates created as to the existing and potential impact of cable television distant signal carriage on the television service received by the public.

50. Our *Report in Docket 21284* and our *Report in Docket 20988* represented the culmination of years of intensive research on the effect of distant signals on television service to the public. Estimates of the future are, of course, inherently uncertain. But in our *Inquiry Reports* we used the information available to us along with certain mathematical tools and with the assistance of the commenting parties sought to reduce these uncertainties to a manageable level. Various approaches to the question were used in order to increase the degree of certainty of our findings, including consideration of gross trends (TV station revenues and profits, television's share of total advertising,

[38] *Notice of Inquiry in Docket 20988, supra*, at para. 9.

[39] *MCI Telecommunications Corp. v. FCC*, Case No. 79-1119, slip opinion at 43 (D.C. Cir., April 2, 1980). See also *Delay in the Regulatory Process*, Senate Document No. 95-72: "Delay in the regulatory process is not merely an irritation. It can add enormous expenses for business that are eventually reflected in higher prices and increased unemployment." (p. 176).

growth in television homes and in UHF television homes), econometric analyses of audience data, and case studies of situations intended as proxies of a potentially unregulated cable television future. We examined the supply and demand for cable television, the amount of audience that cable television diverts from local broadcast stations, and the effect that this loss in audience has on both the viability of local stations and the public service programming that they broadcast. To completely appreciate the care with which we approached this task, the two *Inquiry Reports* and the *Notice of Proposed Rule Making* must be read in their entirety. In brief, however, our conclusion was that the vast majority of television viewers either stand to benefit or will be unaffected if the Commission's regulations regarding distant signals are relaxed.

51. As previously indicated, our discussion will be divided into three parts relating to: impact on television service to the public, the syndicated program exclusivity rules, and the retransmission consent and associated proposals. In each section we will review the substance of the findings from our *Inquiry Reports*, the comments received addressed to these findings, our response to these comments and our general conclusion with respect to each issue.

52. We turn first to the question of the impact of cable television distant signal carriage on television service to the public. The general proposition put forth in favor of distant signal regulation is that, in the absence of regulation, cable operations carrying distant signals will continue to grow, that local audiences will be attracted to cable delivered distant signals reducing the audiences of local stations which will in turn reduce the amount that advertisers are willing to pay to local stations causing the overall revenues of stations to decline. Stations will then, it is posited, reduce the amount of public service or "merit" programming they broadcast, generally reduce the quality of the service they provide, or, in the extreme, terminate operations and go dark.

53. Our economic analysis set about to test the validity of this model of what competition would be like in the absence of regulation. We resorted first to econometric and mathematical modeling techniques. That is we attempted to construct a rigorous model of the interaction of the cable and broadcast industries and, making use of many observations from the available evidence, construct, either manually or using computers, statistical models into which various assumptions could be placed for testing. The particular value of the econometric technique is that results are developed that have degrees of certainty attached to them and which indicate the influence of particular variables among many in contributing to the overall result. While these econometric techniques can be highly sophisticated and make it possible to account for a large number of variables at the same time, they are only as good as the data and the assumptions from which they are made up. As a cross-check for the econometric

projections we also reviewed in detail actual case studies of markets or stations in which cable had been permitted, for various historical reasons, to grow without the limitations that are otherwise established by our regulations. The degree of confidence placed in our conclusions in making the proposals in this proceeding stems in large part from the findings of these case studies which represent in many respect an actual market test of the policies proposed in major aspect devoid of the speculations that are otherwise part of the process of projecting into the future.

54. Our *Reports* received extensive criticism from the television broadcast and television program production industries. However,as we believe our review of the evidence will demonstrate, no evidence has been presented that shows consumers will be disserved by the additional competition from cable television. Instead, the parties have attempted to shroud our conclusions in doubt by criticizing some of the analysis that we relied on. We have reviewed carefully all of the comments in the record and believe the discussion in this section will demonstrate that the criticisms are invalid or do not bear on our ultimate conclusions.

Statistical Models

55. In considering the impact of distant signal carriage on broadcast service to the public we turn first to the econometric and statistical models relating to: 1) the supply and demand for cable television service, 2) the audience impacts of distant signal carriage, and 3) the impact of audience changes on public service programming by television stations. This parallels the discussion which is found in Sections II, III, and V of our *Economic Inquiry Report*. It is important, however, to keep this discussion in proper perspective. Many of the criticisms are minor and, even if correct, not outcome determinative. Moreover, the evidence relied on most heavily in reaching our ultimate conclusion is not at all refuted: local stations have prospered despite the presence of high degrees of cable penetration and the carriage of large numbers of distant signals by the vast majority of cable systems in those markets where cable developed prior to our regulation. The parties opposing our conclusions do not address this finding but, instead, focus their comments on evidence which has less importance for our overall conclusion. Thus, the discussion in this section is weighted toward topics which never cut to the heart of the research that is presented in the *Inquiry Report*. While this framework appears to be unavoidable, we note again that this part of our discussion should be kept in the proper perspective.

56. *SUPPLY AND DEMAND FOR CABLE TELEVISION.* To judge potential cable television impact on broadcast service it is necessary to have some estimate of the amount of cable television service that is likely to develop. Moreover, the effect of limiting distant

signal carriage on cable demand is of particular importance in assessing the social costs that are imposed by our existing rules.

57. In order to obtain this information we undertook an analysis in the *Economic Inquiry Report* [40] which consisted of five major parts: (1) an historical analysis of the development of the cable television industry by size of market, (2) a summary analysis of the economics of the cable television industry, (3) a summary analysis of the demand for cable television, (4) a discussion of the necessary conditions for the viability of cable television in various kinds of markets, and (5) conclusions regarding ultimate levels of cable penetration in individual markets. A brief synopsis of our findings for each of these parts is presented here.

58. Our *Report* showed that the growth of cable television has been inversely related to market size. Cable television generally serves communities with limited local television service or poor off-the-air reception. We found that two-thirds of the approximately 50 million households not now offered cable service are within the "metro" areas of the top 100 markets and 60 percent are in the metro areas of the top 50 markets alone. We concluded that for the cable television industry to match its growth of the past ten years, service must be provided to the large cities which have not yet attracted sufficient funds for construction. Whether these large cities are provided cable television service in the future will depend upon the economics of supply and demand in the cable television industry, including the effects of governmental regulation.

59. We studied the factors affecting cable system viability under various marketplace conditions because viability under various circumstances will determine the industry's future growth. The viability of cable operation is determined by its costs, such as capital costs, construction costs, and operating expenses (i.e., supply factors), and by its revenues (i.e., demand factors).

60. The demand for cable television commonly is measured by the penetration (or saturation) rate: the number of households that subscribe to cable service as a percentage of those offered service. It is important to note that the terms penetration rate, penetration level, and cable penetration often are used interchangeably. For example, we treat the penetration rate as equivalent to cable penetration, although the term, "systemwide cable penetration," actually may be the more appropriate usage. This is true because the terms penetration level and cable penetration also are used to denote the percentage of total television homes in a county or television market that subscribe to cable television (whether or not all of the television homes are offered cable service). In these cases, the more appropriate usage, to avoid confusion, may be countrywide or marketwide cable penetration.

[40] *Report in Docket 21284, supra*, at paras. 74–96.

Nevertheless, we believe that the appropriate meaning of these terms should be apparent from the context in which they appear.

61. A large number of factors affect cable demand—including especially the number and type of signals available over-the-air versus on cable, the reception quality of local signals, the subscription price, and the demographic characteristics of the households offered the service.[41] The extent to which these factors affect the demand for cable television has been analyzed in detail in five major econometric studies.[42] These studies find that the quantity and reception quality of the signals available over-the-air are key determinants of cable penetration. Additionally, the ultimate penetration rate for cable systems in the urban areas of the top hundred markets generally has been predicted to reach only 20 to 40 percent at the prevailing monthly rates in these areas, even with the importation of a substantial number of distant signals. These estimates are supported by current cable penetration data that show, in urban areas with good signal reception quality, systemwide cable penetration often is less than 35 percent. Or, to be conservative, these results imply that if every household in the urban areas of the top hundred markets had access to cable television, less than forty-percent of all households in these areas would subscribe to the service.

62. The effect of distant signals on cable demand is particularly important in assessing the consumer welfare costs of our cable regulations. If consumer demand for distant signals is significant, our signal carriage restrictions result in large sacrifices of welfare for subscribers and potential subscribers. Most of the studies of cable demand estimate that the carriage of four distant independent signals will increase system penetration rates by at least nine percentage points on average. The effect of distant duplicating network stations on cable demand has been estimated to be similar to that of distant independents.

63. The supply of cable television also has received extensive

[41] It should be noted that many commenting parties have criticized the Commission for failing to analyze more closely the demographic characteristics of cable television households. It was believed that a more thorough evaluation of the social costs of cable television deregulation should have been performed by placing greater emphasis on the criterion of distributional equity. This criticism will be addressed more specifically below. Briefly, however, we felt it unnecessary to consider the demographic issue raised in great detail because we concluded that the risk of distributional effects resulting from the rule changes proposed is negligible.

[42] W. S. Comanor and B. M. Mitchell, "Cable Television and the Impact of Regulation," 2 *Bell Journal of Econ. and Management Sci.* 154 (1971); R. E. Park, "Prospects for Cable in the 100 Largest Television Markets," 3 *Bell Journal of Econ. and Management Sci.* 130 (1972); Noll, Peck and McGowan, *Economic Aspects of Television Regulation* (1973); Charles River Associates, Inc., "An Analysis of the Demand for Cable Television," (1973); The John Hopkins University Center for Metropolitan Planning and Research, K. Lyall, R. Duncan, and C. DeKay, *Estimation of an Urban Cable Demand Model and Its Implication for Regulation for Major Markets* (1976).

analysis. Numerous models have been developed to determine the level of cable demand that would be required to generate enough revenues to cover system costs.[43] The conclusion from these models was that breakeven system penetration rates were in the 30 percent to 40 percent range. These estimates were for prevailing prices and for urban areas of the top hundred markets.

64. The final financial parameter for cable television operation considered here is pay cable. The advent of pay television as a service option for the cable television industry potentially can affect both the supply and demand for cable television. Currently, pay cable generally is offered as a pay channel (consisting primarily of movies) only to subscribers of the basic cable service. Only about one-third of all basic cable subscribers that have access to a pay channel subscribe to it. However, the extent to which pay cable will affect the growth of cable television cannot be precisely determined. The continued development of competing services such as multi-point distribution systems, subscription television stations, and video cassettes should have an effect on the growth of both pay cable and the cable television industry.[44]

65. The ultimate cable penetration in an individual market will depend upon the availability of cable television service and the number of households that will subscribe when offered service. Due to the complexity of and the large variation in the factors involved, it is difficult to assess the extent to which cable television will grow to serve new areas. One factor is apparent, however: even if the demand for cable television increases to the point of surpassing the breakeven penetration rate required for new system growth, the demand for basic cable television service in the urban areas of the larger markets is generally such that not more than forty percent of the total number of households offered the service would subscribe.[45] Using this estimate, combined with the higher estimated penetration levels in other areas we concluded that the total number of cable subscribers in all markets will not be greater than about forty-eight percent of the total number

[43] W. S. Comanor and B. M. Mitchell, "Cable Television and the Impact of Regulation," 2 *Bell Journal of Econ. and Management Sci.* 154 (1971); B. Mitchell and R. Smiley "Cable, Cities and Copyrights," 5 *Bell Jour. of Econ and Management Sci.* 264 (1974); R. Crandall and L. Fray, "A Reexamination of the Prophecy of Doom for Cable Television," *Id.*; Noll, Peck and McGowan, *Economic Aspects of Television Regulation* (1973); Mitre Corporation, *Urban Cable Systems* (1971); Rand Corp., L. Johnson, *et al.*, *Cable Communications in the Dayton Miami Valley Area: Basic Report* (1972); The John Hopkins University Center for Metropolitan Planning and Research, *Economics of Cable Television in Urban Areas: Baltimore City* (1975); The John Hopkins University Center for Metropolitan Planning and Research, *Economic Feasibility of a Cable System for Cleveland* (1976); and Cable Television Information Center, *Cable Television Options for Jacksonville* (1973).

[44] Compare the comments of Tribune Company in Dockets 20988 and 21284, September 17, 1979 where reference is made to the service MATV subscribers in apartment buildings receive from MDS and STV stations as placing "Another damper on demand for cable service. . . ." p. 21.

[45] See our discussion in the *Report in Docket 21284* at para. 89–92.

of television households within the foreseeable future, even with unlimited distant signal importation.[46]

66. The Commission's analysis of the supply of and demand for cable television has not received extensive criticism. Only a handful of parties have taken exception to various parts of this section of the *Report*. We believe these comments, when properly analyzed, do not weaken our conclusions from this section that 1) the future growth of cable will be very dependent upon the ability of cable operators to offer consumers additional program choices and innovative services at attractive prices and 2) that no more than about 48 percent of the nation's television households will subscribe to cable television within the foreseeable future. In fact, the comments if anything tend to confirm our belief that the estimates arrived at were reasonable. Some of the commenting parties, in an effort to suggest that cable's impact on television broadcast service will be greater than our estimates, have suggested that we underestimated the likely growth of cable. Others, in an attempt to suggest that cable will never make a major contribution to the television service received by the public, have attempted to suggest that our estimates were too high. When the details of these comments are considered, the net result either reveals misunderstanding on the part of the commenting parties or tends to confirm the results of our earlier study.

67. For example, our prediction of an ultimate nationwide cable penetration of no more than about 48 percent is criticized as being too low by Boston Broadcasters, Inc.[47] because the top 50 cable television operators currently have a 56 percent penetration. National Broadcasting Company, Inc.[48] argues similarly that cable penetration presently is 50 percent where pay cable is available and, as a result, seriously questions the reliability of the Commission's prediction. Despite our clasification of this point at n. 81 of the *Report in Docket 21284*, these criticisms demonstrate a failure to recognize the difference between systemwide cable penetration and marketwide cable penetration.[49] *Systemwide cable penetration* is defined as the number of cable subscribers to a system, as a fraction of the number of homes passed by cable by that system. *Marketwide cable penetration* is defined as the number of cable subscribers, as a fraction of the total number of television households in the entire market. The statistics furnished by the commenting parties refer to *systemwide* cable penetration. Our

[46] For the complete derivation of this conclusion, see the *Report in Docket 21284* at n. 105.

[47] Comments of Boston Broadcasters, Inc., Dockets 20988 and 21284, September 17, 1979.

[48] Comments of National Broadcasting Company, Inc., Dockets 20988 and 21284, September 17, 1979.

[49] Boston Broadcasters, Inc. filed supplemental comments on October 11, 1979 dealing specifically with this point. However, these comments fail to correct their previous error.

estimates pertain to *marketwide* cable penetration. For example, cable systems currently attract an average of about 53 percent of the homes they pass with cable.[50] But this figure *cannot* be extrapolated to the entire nation, *even if every home in the nation were passed by cable*, because two-thirds of the households currently without access to cable television are located in the "metro" areas of the top 100 television markets. The demand for cable television in these areas is significantly lower than in areas currently served by cable due to the large number of signals that is readily available without cable. Or, in other words, the aggregate systemwide cable penetration currently is as high as 53 percent only because cable television has grown to serve first the areas which have the greatest demand for its service. Therefore, if cable grows to serve the large urban areas that have not yet attracted the funds necessary for construction, the aggregate systemwide cable penetration will decrease. Thus, we find this criticism is without merit when the economic evidence is interpreted correctly.

68. The Association of Independent Television Stations, Inc., (INTV)[51] suggests that the estimate of 48 percent nationwide cable penetration must be re-evaluated in light of the cable industry's own predictions. INTS cites *Cablevision* and *Cablecast :t0 to say that "cable industry leaders have predicted 50 percent cable penetration nationally by 1990."*[52] *The actual statement in Cablevision*, however, is that "within the next three to five years, it is forecast that cable will serve 30 percent of all households in the United States and an estimated 50 percent of all homes will have cable service *available* to them." (Emphasis added).[53] The 50 percent figure refers to homes passed by cable, not subscribers to the systems. (That is, these households will have access to cable television, but will not necessarily subscribe to the service.) Similarly, not only is the citation to *Cablecast* incorrect,[54] but neither of the two issues which INTV may have been referring to can be used to validate their claim of a 50 percent nationwide penetration by 1990. The closest reference to this prediction in the two issues is that "cable operators are now beginning to realize that if they can sell additional services to, say 70 percent of their subscribers [in urban areas], and if basics are only 40 percent of homes passed, they really have 68 percent penetration. For this they will build."[55] This quotation suggests that a (basic) cable penetration of only 40 percent (of the homes passed by the system) is expected in urban areas. This

[50] *See* the *Report in Docket 21284* at para. 78.

[51] Comments of the Association of Independent Television Stations, Inc., Dockets 20988 and 21284, September 17, 1979.

[52] *Id.* at 22.

[53] *Cablevision*, "Advertising on Cable: From Madison Ave. to Main St.," October 23, 1978 at 22.

[54] INTV cites *Cablecast*, No. 188, December 18, 1978. The December 18, 1978 issue of *Cablecast* is No. 218. The issue numbered 188 is dated September 12, 1977.

[55] *Cablecast*, Paul Kagan Associates, Inc. No. 218, December 18, 1978.

suggestion corresponds with our estimate of cable demand, and contradicts INTV's claim for 50 percent nationwide cable penetration.

69. INTV also refers to the assumption by Paul Kagan Associates, Inc. that an additional 2.5 million households will subscribe to cable television every year until 1985. INTV then applies the assumption well beyond the range intended and concludes that "the national cable penetration would exceed 55 percent in less than 15 years."[56] However, the validity of assuming a constant increase in the number of cable subscribers is highly questionable. Growth curves rarely follow this pattern over an extended time period. Instead, a logistic growth curve frequently is used to represent growth processes.[57] This reflects the fact that the most economically desirable locations for cable systems are constructed first and the fact that television viewers most desiring cable service become subscribers first.

70. Boston Broadcasters, Inc. proposes an additional argument for our 48 percent nationwide cable penetration estimate being too low in that it states, "when local stations are deprived of the best in professional sports, the more popular syndicated programming, and popular movies, more and more people will subscribe to cable in order to receive pay cable."[58] We note that the assumption guiding this argument is strikingly similar to that which the Commission relied upon in promulgating its former pay cable rules. In reviewing these rules, the Court found that "if there is any evidentiary support at all [that siphoning is real, not imagined], it is indeed scanty"[59] and as a consequence these rules were eliminated. No evidence has accumulated since the Court's statement and the elimination of the rules, nor has any such evidence been submitted in this record which suggests that such program siphoning will occur.

71. Boston Broadcasters, Inc. also claims that the estimate of 40 percent cable penetration in the metro areas of the top 100 markets is too low because recent surveys in Boston suggest that as many as 40 to 55 percent of the households offered service would subscribe. It seems to us, however, that reliance on surveys such as these should be kept to a minimum given the experience of existing cable systems. Surveys of this type often are unreliable because of the inflated expectation that people have of cable television before receiving the service, especially when pay cable television is included in the marketing package.[60]

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[56] *Supra*, n. 51 at p. 22.

[57] *See, e.g., Rolla Edward Park, Potential Impact of Cable Growth on Television Broadcasting*, the Rand Corp. R-587-FF, October 1970.

[58] *Supra*, n. 47 at 9.

[59] *Home Box Office, Inc. v. FCC, supra* at 42.

[60] *See, e.g.*, Walter S. Baer, *Cable Television: A Handbook for Decision-making*, the Rand Corp., R-1133-NSF at 44, February 1973.

Actual experience and existing research, indeed, do suggest otherwise.[61]

72. In contrast to the above comments which suggest that cable penetration will be higher than our estimate, others say our estimate is already too high. American Broadcasting Companies, Inc. (ABC) says that "the enormous cost of wiring the nation . . . casts doubt upon achievement of even the 48 percent penetration level projected in the *Economic Inquiry Report.*" [62] It should be noted, however, that the ultimate nationwide cable penetration was estimated by the Commission to be *no more than* about 48 percent, even assuming that all households would have access to cable television. The possibility that all households would have access to cable television is extremely unlikely. Hence, the 48 percent figure represents an upper limit on nationwide cable penetration.[63] We believe this estimate provides a sufficiently conservative[64] basis from which to predict the future long-run impact of eliminating our distant signal carriage and syndicated exclusivity rules on local station audiences.

73. ABC also cites a report from the Commission's Broadcast Bureau on the information developed under the cable economic inquiry which said that "in our review of the demand for cable discussion, we find no indication that the staff performed a critical evaluation of any of the five studies."[65] Similarly, reference is made to the Broadcast Bureau's belief that the "assessment of the future of cable lacks analytical depth."[66] However, as noted in n. 80 of the *Report in Docket 21284*, a comprehensive summary and evaluation of the five studies on the demand for cable television was prepared for the Office of Telecommunications Policy (OTP), Executive Office of the President by six leading scholars in the communications field.[67] We felt this analysis was adequate, and thus determined that an additional detailed review of these studies was unnecessary.[68] Similarly, the assessment of

[61] This is not to suggest that we would find higher penetration levels undesirable for this would suggest that cable was contributing even more than anticipated to the welfare of subscribers.

[62] Comments of American Broadcasting Companies, Inc., Docket 21284, at 37, August 3, 1979. The ABC comments in this proceeding and those of Bahia De San Francisco *et al.*, are substantially duplicative. Therefore comments attributed to ABC may also generally be attributed to Bahia De San Francisco *et al.*, throughout this discussion.

[63] For further clarification of this point, see n. 86 in the *Report in Docket 21284*.

[64] By conservative we mean a figure which tends to exaggerate the effect of cable television and thus makes any resulting impact estimate an upper bound one.

[65] Broadcast Bureau, Report on Information Developed Under the Cable Economic Inquiry, April 18, 1979 at 29.

[66] *Id.* at 32.

[67] *See* S. M. Besen, B. M. Mitchell, R. G. Noll, B. M. Owen, R. E. Park and J. N. Rosse, *Economic Policy Research on Cable Television: Assessing the Costs and Benefits of Cable Deregulation* (1976).

[68] We also attempted to avoid excessive duplication of the OTP report by focusing the summary of cable demand on factors that are relevant to this proceeding. For example, while ABC seems to believe the sensitivity of demand to price is worthy of

the future growth of cable television relies heavily upon this analysis, together with the very conservative assumption that all households will be passed by cable in the future. We believe this approach provides a sufficient basis upon which to ascertain future potential levels of cable penetration for rulemaking purposes.

74. Some parties also have alleged a failure on the Commission's part to estimate the effect of pay cable on the growth of cable television. For example, Boston Broadcasters, Inc. finds that "amazingly, no consideration has been given by the Commission to the substantial effect that pay cable would clearly exert on the number of cable subscribers."[69] Similarly, INTV notes the inability of the Commission to estimate the effect of pay cable on the supply of cable television and concludes that the "estimate of 48 percent penetration in the foreseeable future appears to be nothing more than a guess."[70] To place the above criticisms into proper perspective, the Commission has found that sufficient data to determine the extent to which pay cable channels will increase the basic penetration rate are not yet available. Thus, the extent to which pay cable will affect the supply of cable television is not fully known at this time. However, no evidence concerning the effects of pay cable on the growth of cable television exists or has been presented which suggests our findings are incorrect. Pay cable, along with competitive services such as multipoint distribution systems, subscription television stations, video cassettes, low power television, and direct satellite to home broadcasting, are in the developmental stage. Any positive effect that pay cable is having on the growth of cable television in the short run is likely to be offset to some extent by competing services in the long run as these services begin to provide consumer access to services which may not be available only from cable. This marketplace response also applies to other non-broadcast services offered on cable. That is, if there is a significant consumer demand for other non-broadcast services offered on cable, we expect that these services also will be offered by competing distribution technologies. Most importantly, however, we believe we have adequately dealt with the uncertainties created by these new developments by estimating the effect of pay cable on the growth of cable television using the extremely conservative assumption that cable television will grow to pass every home in the nation. This approach provides an estimate of nationwide cable penetration that has an extremely small probability of being underestimated.[71]

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review, we do not believe this factor is critical for determining the impact of cable television on local station audiences given that cable system operators set prices to maximize profits and not subscribers.

[69] *Supra*, n. 47.

[70] Comments of Association of Independent Television Stations, September 17, 1979 at 21.

[71] ABC in its comments has set forth some estimates of the cost of wiring the nation with two-way cable service. According to ABC "even assuming a very conservative

75. The final area of criticism of this section of the *Report in Docket 21284* concerns the effect of additional distant independent signals on the demand for cable television. We found that distant independent signals increase the demand for cable television. While the extent of this increase is unclear, most studies estimate that the carriage of four distant independent signals will increase system penetration rates by at least nine percentage points on average. It is important to note that this increase is for system penetration rates and not county or market cable penetration. If some households in a television market do not have access to cable television, the effect of distant signals on marketwide cable penetration will be less than that on system penetration rates.

76. The National Association of Broadcasters (NAB)[72] performs its own analysis of the studies on cable demand and argues that our finding of the consensus of the effect of distant independent signals on cable demand is too high. On the other hand, Boston Broadcasters, Inc. expects that "the increase would be even greater [than the Commission estimates] in areas where the quality of television reception off-the-air is reasonably good."[73] INTV seems to believe that the extent of the increase in cable demand from additional independent signals is unclear.[74]

77. The only discussion in the comments that evaluates the findings of the studies on the demand for cable television is provided by NAB. NAB addresses five studies on cable demand, including that by Wharton Econometric Forecasting Associates which was undertaken as part of their audience model developed for this proceeding. For background in evaluating NAB's discussion, it should be noted that

household cost of $4,000, it would cost *$243 billion* to provide the presently unwired 60.8 million households with cable television service." Comments filed August 6, 1979 at 38. While these estimates are merely extrapolations from a study completed in 1968 and may not be very scientific, they do suggest why we believe our use of a 100 percent wiring assumption is extremely conservative.

[72] Comments of the National Association of Broadcasters, Docket 20988 and 21284, September 17, 1979.

[73] *Supra*, n. 47 at 6.

[74] Although these parties differ on the facts, each uses its version to argue against changes in the rules. Thus, Boston Broadcasters, Inc. argues that the estimated effect of distant signals on cable penetration is too low because cable penetration is correlated positively with audience diversion. Hence, if the predicted cable penetration was higher, the predicted audience losses due to cable also would be higher. On the other hand, NAB argues that the effect of distant signals on cable demand is not substantial because it realizes that the major reason for allowing the importation of distant signals is the benefits that consumers derive from those signals. If there was little increase in cable penetration, NAB could argue more convincingly that distant signal importation is not in the public interest. We note, however, that NAB's argument is not very persuasive from a theoretical perspective. If consumers did not demand distant signals, cable systems would not import them. Furthermore, if no one were to watch distant signals, there would be no audience diversion from the local stations, so presumably NAB would not have cause for concern with importation of distant signals.

Noll, Peck, and McGowan present two studies of cable demand in their book by collecting data for two distinct samples.[75] One sample was chosen specifically to estimate the demand for cable television in the 100 largest markets. However, the authors found that "when this is done there is very little intersystem variation in the cable viewing options relative to over-the-air options so that the impact of added viewing options cannot be reliably estimated."[76] That is to say that in their sample of systems in the larger markets, most systems carry roughly the same number of distant signals and are faced with similar competition from local over-the-air television signals. Since there is little variation in the signals available to cable and non-cable households among large markets, it is difficult to estimate systematically the effect of additional signals. As a result, Noll, Peck and McGowan report that the overall explanatory power of this study is very low, and characterize it as having "highly inconclusive results."[77] In fact, when estimating the value that consumers derive from "free" television, an extremely important measure for the conclusions reached in their book, the authors do not rely upon this study, but rather rely upon their second study of cable demand. Resultantly, we did not include the study with highly inconclusive results among the five studies of cable demand reviewed in the *Report in Docket 21284*. Instead, we relied upon the second study performed and favored by the authors in their own work.

78. With this background, we find that in NAB's discussion of the studies of cable demand, reference is made to the study by Noll, Peck and McGowan that is not included in our review. We do not believe that any reliance can be put on this study. Hence, we find any conclusions that NAB attempts to draw from it unacceptable. Similarly NAB also criticizes our reliance on the study by Park, "Prospect for Cable in the 100 Largest Markets"[78] because "Park's results, by his own admission, were not directly applicable to major television markets because most systems existing in 1970 were located in areas where off-the-air service was poor, due to lack of stations or bad reception."[79] This criticism also is without merit. Park characterizes his sample by saying the "model is developed using a sample of 63 cable systems located where several signals can be received over-the-air with no particular reception problem"[80] Additionally, Park says that the "levels of [off-the-air] service [in the communities served by these

[75] Noll, Peck, and McGowan, *Economic Aspects of Television Regulation* (1973).
[76] *Id.* at 292.
[77] *Id.* at 293.
[78] Rolla Edward Park, "Prospects for Cable in the 100 Largest Television Markets," *5 Bell Jour. of Econ. and Management Sci.* 130 (1972).
[79] *Supra*, n. 72 at 79–80.
[80] *Supra*, n. 78 at 130.

systems] are roughly the same as those found in most of the top 100 markets."[81] Hence, NAB's review of the Park study is in error.

79. Taking the above criticisms of NAB's review of the studies on cable demand into account, we believe that our finding of the effect of additional distant independent signals on the demand for cable television remains sound. Most studies estimate that the carriage of four distant independent signals will increase system penetration rates by at least nine percentage points on average. However, NAB contends that the Wharton study submitted with NAB's comments in response to the Commission's original *Notice of Inquiry in Docket 21284* is worthy of far more confidence than previous efforts to estimate the significance of the various factors which influence demand for cable television. For example, NAB draws upon the Wharton study to conclude that in a market with three local independent stations in addition to three network affiliates, increasing the number of imported distant independents from 1 to 6 leads to an increase in cable penetration of 3.1 percent. NAB proceeds to conclude that "rarely will the projected increase of 3 or 4 percent fall at the critical margin of deciding whether or not to construct a cable system in a particular television market."[82] However, NAB has erroneously interpreted Wharton's treatment of cable penetration. Wharton defines cable penetration as the number of cable subscribers in a county as a fraction of the number of television households in that county.[83] This is not equivalent to systemwide cable penetration as NAB infers. Thus, NAB has made an error similar to that of INTV and other commenting parties in this proceeding as to the appropriate use of cable penetration. In this case, NAB mistakes countywide cable penetration for systemwide cable penetration. Since some homes will not have access to cable television, the effect of distant signals on countywide cable penetration will be less than that on systemwide cable penetration. Hence, Wharton's results are not necessarily inconsistent from those of the other studies of cable demand.

80. In summary, the criticisms leveled at the *Report in Docket 21284* have not persuaded us that our analysis of the supply and demand of cable television is incorrect. We continue to believe that the future growth of cable television will be dependent upon the ability of cable system operators to offer consumers additional program choices and innovative services at attractive prices. We also believe that no more than about 48 percent of the nation's television households will subscribe to cable television within the foreseeable future. We regard this estimate as sufficiently conservative to account for the possible effects of pay cable on system growth.

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[81] *Id.* at 136.

[82] *Supra*, n. 72 at 84.

[83] Wharton treats each county as representative of a market. Hence, countywide cable penetration is treated as analogous to marketwide cable penetration.

81. *THE IMPACT OF DISTANT SIGNALS ON LOCAL STATION AUDIENCES.* Having developed some understanding of likely cable television growth patterns, the next step in our analysis in the *Economic Inquiry Report* was to obtain information on the audience behavior of cable television subscribers with access to distant signals. From this, estimates of the total local station audience impact likely to result from elimination of the distant signal carriage rules could be developed. In the *Inquiry* stage of this proceeding we were fortunate to have available a wealth of new information made available in large part due to new audience data from the audience rating services on the viewing habits of both cable and non-cable households in individual counties. Four major studies that made use of these new data were relied on heavily by the Commission. These studies were prepared by the National Cable Television Association (NCTA),[84] the Motion Picture Association of America (MPAA),[85] Wharton Econometric Forecasting Associates (WEFA) for the National Association of Broadcasters,[86] and Dr. Rolla Edward Park of the Rand Corporation under contract to the Commission.[87]

82. The NCTA, in a study of 109 stations operating in television markets with greater than 33 percent cable penetration, reported that the average audience diversion due to cable for the entire day is 8 percent, and is greatest in smaller markets. For instance, in one- and two-station markets cable diverts an average of 10 percent of audience, while in markets with three or more network stations, cable diverts an average of only 4 percent of potential audience. This difference is attributable to, in large part, the importation of the second and/or third network signal into the smaller markets. The diversion from UHF licensees was found to be one-third of that from VHF licensees because of the greater improvement in reception that cable television provides UHF stations. Additionally, since no market with greater than 33 percent cable penetration contains a local independent station, NCTA also analyzed the effect of cable on the audiences of mature UHF independents. Of the fifteen mature UHF independents for which the necessary viewing data were available, NCTA reported that cable augments the viewing of thirteen of these stations. Two UHF independents experienced an audience loss averaging 1.5 percent. We noted that the studies by NCTA do not adjust for

[84] National Cable Television Association, comments in Docket 21284, March 15, 1978.

[85] Motion Picture Association of America, reply comments in Docket 21284, June 20, 1978.

[86] National Association of Broadcasters, comments, "The Impact of Cable TV on Local Station Audience" prepared by Wharton Econometric Forecasting Associates, Docket 21284, March 15, 1978.

[87] R. E. Park, "Audience Diversion Due to Cable Television: A Statistical Analysis of New Data," the Rand Corporation, prepared for the Federal Communications Commission, January 1979. Attached as Appendix A to the *Report in Docket 21284.*

the greater amount of television viewing by cable subscribers, nor do they estimate the effect of alternative signal carriage rules.

83. The MPAA study focused on individual counties rather than on an entire market and found that local stations lost more audience as the proportion of television households in a county subscribing to cable television increased. The audience diversion attributable to cable at a 12.5 percent cable penetration was reported to be 2.4 percent. At 50 percent cable penetration, audience diversion due to cable increased to about 15 percent.

84. The applicability of the results of the MPAA study are limited somewhat due to the aggregation of county data. MPAA aggregates all of the counties in its sample by the level of cable penetration and disregards the complement of local signals in the counties. However, the audience diversion for the local stations due to cable television is likely to differ substantially depending upon the number of local signals, even if the level of cable penetration is identical. For example, holding other factors constant, cable television diverts more audience where there is only one local signal because of the importation of a second and third network signal. Thus the applicability of the general results presented by MPAA is inadequate for assessing the effect of cable on local stations for any specific case.

85. While the above studies provided a "snap shot" view of the impact of cable television on local station audiences, the NAB-WEFA and Park studies, which were also relied on, attempted to estimate by econometric methods the effect of a *change* in the number of imported distant signals on local station audiences.

86. The NAB-WEFA study is an ambitious and comprehensive undertaking that compiles data for all counties for which viewing data are available for both cable and non-cable households. The model, however, employs a highly complex structure which increases the difficulty of analyzing simulations of the model. While we found certain flaws in the model which were reviewed in the *Economic Inquiry Report* and which we believed biased the finding that small independent stations suffer most from additional distant signals on cable, we were able to use it in terms of marketwide impacts by aggregating the predicted impacts to both independent stations and network affiliates, thereby providing one estimate for the entire market. For example, our summary of the NAB-WEFA results for large markets containing independent stations was that increasing the number of distant independent stations from 1 to 6 would reduce local station audiences by 10 to 13 percent at a 50 percent marketwide cable penetration.

87. In small markets, where *no* adjustments to the NAB-WEFA model were made, NAB-WEFA found that increasing the number of distant signals from 1 to 6 would reduce local station audiences by 8.7 to 12.7 percent at a 52 percent marketwide cable penetration, depending upon the number of local signals. Finally, in medium-sized

markets with three local stations, increasing the number of distant independent signals from 2 to 5 was predicted to decrease local station audiences only by 6.5 percent, even at the unreasonably high marketwide cable penetration of 68%. In neither case were the findings inconsistent with the results of the other studies in this proceeding.

88. Park, in a study done under contract to the Commission, estimated the effect of additional distant signals on local station audiences by using a simpler model based on a sample of 121 counties. He provides estimates of audience diversion due to cable under both the current signal complement permitted by the FCC rules and under relaxed signal carriage rules. The estimates for each are provided at both current and projected ultimate cable penetration levels. At current cable penetration, the incremental audience diversion from eliminating the signal carriage rules is estimated by Park to be 14 percent or less for all cases. At the projected ultimate marketwide cable penetration levels, the incremental audience diversion is estimated to be less than 20 percent in all but the smallest markets. However, we characterized Park's long-term results as being overstated, especially in small markets, because the projected ultimate cable penetrations are too high.[88] Hence, we interpreted Park's results for the long term as predicting virtually no scenario where the relaxation of the signal carriage rules will generate more than a 20 percent audience diversion. It should also be noted that we had numerous other problems with the Park model, aside from the projected levels of cable penetration, that led us to conclude that Park overestimated the effect of eliminating the signal carriage rules. These problems are important to note in assessing our conclusion of the general consensus of the impact of cable television on local station audiences. They will be discussed in detail below.

89. In conjunction with these four studies as well as the other comments received, we also analyzed the current impact of cable on local station audiences for six grandfathered markets, seven independent stations, and nineteen "worst case" broadcast stations or markets alleging harm due to cable. Audience diversion due to cable was found to be less than 10 percent in more than two-thirds of the cases analyzed. The specific findings of this study are discussed in detail below. For present purposes it is sufficient to note that the findings from the grandfathered markets contributed to our assessment of the more general statistical studies. The results of the analysis of these markets contributed heavily to our conclusions because they provide an excellent picture of the marketplace working essentially *without* signal carriage restrictions.

[88] In particular, Park's estimates for ultimate cable penetration are based on the assumption that every home will be passed by cable. We found this to be an unlikely possibility, especially in areas of low population density.

90. The consensus on the audience diversion due to cable television that was reached in the *Report in Docket 21284* was that:

> (a) The impact of cable television on local station audiences under current market conditions generally is less than 10 percent. This finding includes cases with extraordinarily high cable penetration and a large number of distant signals. For example, in one of the most extreme cases, Bakersfield, California, the local stations lose only between 9 and 13 percent of their potential audience due to cable, even though more than half the households in their market have access to at least seven distant signals on cable. Additionally, UHF stations, particularly UHF independents, often receive audience gains from cable television.
>
> (b) The incremental audience diversion from eliminating the signal carriage rules will be less than 10 percent at all marketwide cable penetrations that are realistic in the foreseeable future for all but a few cases.

91. Our analysis of the impact of distant signals on local station audiences has received extensive criticism from the television broadcast and television program production industries. These range from specific criticisms of the Park study to the allegation that the Commission was highly selective in its use of the available research material. Each of these criticisms will be addressed separately below. Our discussion should demonstrate that the *incremental* audience diversion from eliminating the signal carriage rules will be less than 10 percent in the foreseeable future except for a very few cases. The fact that the data tell the same story in almost all cases shows the validity and robustness of the consensus that we have drawn from them.

92. Our goal throughout this proceeding has been to insure that we would have available the most accurate evidence possible from which to make a public interest determination. We considered this to be of particular importance in view of the fact that the stakes to consumers from the final outcome of this proceeding are so high. Many of the commenting parties devoted a large amount of their energies toward criticizing the Park study. As a preliminary matter, we must emphasize that we did not place our sole reliance, or, indeed, any overbearing emphasis on the Park study in reaching our conclusions on the impact of cable on local stations' audiences in the *Report in Docket 21284*, since it was only one of several studies that addressed this relationship. However, to alleviate any justifiable concern that might have a reasonable bearing upon the accuracy of the Commission's determination, we contracted with Dr. Park to address the criticisms of his initial study and to make certain modifications to improve it and test the validity of certain criticisms. (See Appendix B) As it turns out, our analysis shows that the additional work performed by Park acts to strengthen our previous conclusion concerning audience diversion due to cable television. Therefore, we rely, in part, upon the additional work undertaken by Park in addressing the criticisms of the television broadcasters and program producers that are relevant to this section. It should also be noted that at an earlier juncture in this proceeding we made numerous attempts to obtain modifications of the NAB-WEFA

model so that it too could be relied on with greater confidence. However, the requested information was never received.

93. *The Consensus Effect.* Parties critical of our proposal, and the *Economic Inquiry Report* generally, have argued that the consensus of the studies reported was arrived at only through a misuse or misreading of the studies relied on. Thus, for example, ABC claims that "the Commission unfairly and improperly failed to give sufficient weight to studies submitted by NAB, MPAA, INTV and ABC, each of which predicted adverse impact on television broadcasting in more significant measure than the studies upon which the Commission relied."[89] The ABC Television Affiliates Association points out that Park's results "vary tremendously from the *Economic Inquiry Report's* conclusion that 'in all but the most extreme cases, the additional audience loss will be less than 10 percent in the foreseeable future' "[90] Upon reviewing the Commission's summary of the Park study, Capital City Television *et al.*, finds "the Commission's conclusion that 'there is virtually no scenario which generates a 20 percent audience loss within the foreseeable future from relaxed signal carriage rules,' is clearly misleading."[91] The Joint Motion of the Association of Independent Television Stations *et al.*, alleges that "whereas the staff either ignored or went to great length to include material critical of NAB, MPAA, and INTV, it included virtually no criticism of either the NCTA or Park audience loss studies."[92] The National Association of Broadcasters complains of our treatment of its study, stating the we "capriciously chose to ignore critical findings of the Wharton study . . . ."[93] INTV states that "since part of the Cooper study [commissioned by INTV] relied on data from the Wharton study, it too was discounted by the Commission without any discussion." Further, "there is no indication in any of the documents in this proceeding that the Commission even considered those portions of the Cooper study not relying on the Wharton data."[94]

94. As explained in the *Report in Docket 21284*, notable examples

[89] American Broadcasting Companies, Inc., comments in Dockets 20988 and 21284, August 3, 1979 at 6.

[90] ABC Television Affiliates Association, comments in Dockets 20988 and 21284, September 17, 1979 at 14.

[91] Capital City Television *et al.*, comments in Dockets 20988 and 21284, September 17, 1979 at 5.

[92] Association of Independent Television Inc.; Caucus for Producers, Writers and Directors; Metromedia, Inc.; Motion Picture Association of America, Inc.; National Association of Broadcasters; National UHF Broadcasting Association; and Screen Actors Guild; *Joint Motion for Revision of Procedures*, Dockets 21284 and 20988, June 22, 1979. The discussion provided therein has been incorporated into the comments of this proceeding by the Motion Picture Association of America.

[93] National Association of Broadcasters, comments in Docket 20988 and 21284, September 17, 1979 at 111.

[94] Association of Independent Television Stations, comments in Dockets 20988 and 21284, September 17, 1979 at 28.

of audience studies submitted as comments in this proceeding that provided information which we consider very valuable in reassessing our cable policies and rules include those by NAB-WEFA, NCTA, and MPAA. Other comments, including those of ABC, we noted as submitting data that attempted to display the impact of cable television on local station audiences. The data provided by these comments, however, were not considered valuable for policy purposes because of the inadequacy of the analysis provided therein. The study by ABC, for example, focused primarily on the disparity in the share of viewing of local stations between cable and non-cable households. This analysis gives an entirely incomplete picture of the effect of cable on local stations because it fails to account for the relative sizes of the cable and non-cable populations.[95] Other studies, such as those of the Rocky Mountain Broadcasters Association, also appeared to us not to be usable in isolation for predictive purposes. Rather, to address the concerns in these comments, we analyzed, using a standard procedure, key economic factors of each station and/or market that was identified as being harmed by cable. Careful attention was given to the viability of these stations and, in cases of financial hardship, the extent to which cable was responsible for their financial distress. (See para. 174 below.) A similar procedure has been implemented for the comments in this round of the proceeding.

95. Additionally, while noting their limitations, the results of the studies of audience diversion by NCTA and MPAA were accepted by the Commission *in toto*. These studies generally are carefully done. And, despite ABC's claim, the results of the MPAA study are well within the bounds of audience diversion established as the consensus opinion by the Commission. For example, MPAA finds audience diversion from local stations attributable to cable television to be about 8 percent in counties with 30 percent cable penetration. Our conclusion in the *Report in Docket 21284* was that the impact of cable television on local station audiences at the present time generally is below 10 percent.[96]

96. On the other hand, the specific results of audience diversion for local independent stations predicted by the NAB-WEFA were rejected because of the inherent bias attributable to the model specification.[97] Where estimates were provided specifically for independent stations, we chose instead to employ the NAB-WEFA model to provide one estimate of audience diversion for the entire market.

97. The results of the NAB-WEFA model as to the incremental

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[95] See also our discussion on the appropriateness of using "share data" in the Case Study Section of the *Report in Docket 21284*.

[96] For a comparison of the results of the major studies submitted in this proceeding on audience diversion, *see* the *Report in Docket 21284*, para. 116(a). *See* also Park, Appendix A, *Report in Docket 21284* at 38–48.

[97] For a detailed analysis of the NAB-WEFA predictions, *see* the *Report in Docket 21284* at para. 107 and n. 116.

effect of additional distant signals on local independent stations were unacceptable because of: 1) the use of the "logit" equation specification, 2) estimation of the effect of increasing the number of distant independent signals from 1 to 6, instead of from a base of 2 signals as our rules currently permit for the markets analyzed, and 3) the use of unrealistically high marketwide cable penetrations.

98. To actually demonstrate the shortcomings of the NAB-WEFA study, we would have liked to compare its results to the detailed case study analysis that we performed for grandfathered markets (as we did with the Park study). We believe this comparison particularly would be enlightening if it could be undertaken for small UHF independent stations. Unfortunately, NAB-WEFA has not answered our requests for additional information. Furthermore, we have been unable to duplicate the reported results of the NAB-WEFA study.[98] In these circumstances we do not think it would be appropriate for us to employ the NAB-WEFA model to make predictions of audience diversion due to cable for the small independent stations that we analyzed in the case studies.

99. The main problem identified with the NAB-WEFA study was that it employed a "logit" equation specification for predicting audience shares under various signal complements. Our *Report* showed that employment of this equation specification resulted necessarily in a proportionately greater impact on local independent stations than network affiliates, regardless of what the actual data may have indicated.[99] Hence, we rejected the "finding" that small, independent stations suffer most of the audience losses from additional imported signals. Instead, as indicated previously, we summarized the results of the NAB-WEFA model by providing its prediction of the impact of cable on local station audiences for an entire television market, and not for its predictions of the impact on individual stations.

100. In its reply to the Commission's critique, WEFA finds that "the derivation of derivatives shown in footnote 116 (page 61) of the FCC document is correct," but "the mathematics in footnote 116 support a conclusion exactly opposite to that given in the text of paragraph 107(i)."[100] WEFA's reasoning in reaching this conclusion is flawed. In fact, its own analysis confirms our findings. WEFA finds that "what the FCC has shown is that the percentage change in the

[98] For example, when we employ the NAB-WEFA model, we find that the sum of individual shares predicted for each station in a market varies greatly from 100 percent. In contrast, NAB-WEFA, without explanation, reports that the predicted shares of the individual stations in a market sum to 100 percent.

[99] *See* the *Report in Docket 21284* at para. 107 and n. 116 for a more detailed demonstration of the correctness of this statement and the nature of a "logit" equation.

[100] *Supra*, n. 93, Exhibit H, at 1, 2.

market share (which is like a percentage change in a percentage share) increases as the market share decreases."[101] This is precisely the reason for which we reject WEFA's findings for independent stations (i.e., those stations with small market shares). Thus, the validity of our reasoning is not rejected, but agreed upon by WEFA. Furthermore, WEFA proceeds to provide numerical examples to demonstrate the validity of our criticism of the WEFA model.[102] WEFA's error in its reply is attributable to considering the absolute change in a local station's viewing share from additional distant signals rather than the percentage change. We are interested in and the NAB-WEFA model provides predictions for the latter. We find, and WEFA agrees, that this loss must necessarily be estimated to be greater for small independent stations when the logit equation specification is employed.[103] Hence, WEFA's criticism of our analysis of the NAB-WEFA's study is flawed.

101. Our *Report* also found that providing projections of audience diversion in larger markets when the number of imported signals is increased from 1 to 6 is not very helpful for policy purposes because two signals can be imported in these markets under existing FCC policies. Without explanation, WEFA contends that "the logic of [this] argument seems to be missing."[104] We feel, however, the logic of our argument is clear. The effect of relaxing the signal carriage rules in the larger markets is not equivalent to the effect of increasing the number of imported signals from a base of one. The appropriate incremental effect should be calculated from a base of two distant independent signals because we currently permit this many signals to be imported into all of the larger markets.[105]

102. WEFA also disagrees with our categorization of the market in their study with 3 network affiliates and 1 independent as a large market and therefore claims our criticisms of this simulation are not relevant.[106] However, in their original study, WEFA says that "we have considered two different local signal offerings for the *larger* market: three local network stations and one local independent. . ."[107] (Emphasis added.) Hence, in its report, WEFA categorizes its set of results for the market with 4 local stations as a larger market.

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[101] *Id.* at 4.

[102] *Id.* at 7. As documented in n. 116 of our *Report*, we believe the column entitled "ds/dx/S-logit" is the appropriate focus.

[103] It should be noted that WEFA also mistakes the Park audience model undertaken for the proceeding as a linear one, and proceeds to demonstrate that the same result holds for linear models. However, the Park model is not a linear one. For further discussion, *see* Park, Appendix A.

[104] *Supra*, n. 93, at 8.

[105] *See* 47 C.F.R., Part 76, Subpart D.

[106] This categorization is provided in the *Report in Docket 21284*, Section III, Table 2.

[107] *Supra*, n. 86 at 97.

Therefore, WEFA's claim in its reply is negated by its own discussion in the original study, and our criticisms of its procedure remain.[108]

103. Additionally, because it relies on the NAB-WEFA findings for the impact of cable television on local station audiences, Roger Cooper and Associates submitted an additional analysis which attempts to justify the NAB-WEFA findings.[109] For example, since our interpretation of the NAB-WEFA model is that smaller stations must necessarily be estimated to suffer greater audience losses (in percentage terms) from additional distant signals, Roger Cooper and Associates requested NAB-WEFA to run an additional simulation for a market containing an independent station with a much smaller audience share than specified previously. In comparing the results for these two cases, Roger Cooper and Associates conclude that "cable affects the local independent station in almost exactly the same way."[110] Roger Cooper and Associates bases this conclusion on the results presented in Table III of its analysis. In this table, importation of one distant independent signal on cable is calculated by Roger Cooper and Associates from NAB-WEFA's predictions to divert 38 percent of the audience from both the smaller and larger local independent stations. However, one of these calculations is arithmetically in error. The audience diversion to the stronger independent station, from a share in cable homes of 16.8 percent to a share of 12.1 percent, is 28 percent, and not 38 percent as Roger Cooper and Associates calculate. Therefore, instead of contradicting, it appears that Roger Cooper and Associates also has supplied an example supporting our criticism of the NAB-WEFA model.

104. Due to the fact that *both* of the Cooper studies[111] submitted in INTV's comments relied *exclusively* upon the NAB-WEFA results for independent stations for their estimates of audience diversion, we also rejected this analysis.[112]

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[108] Careful analysis of WEFA's predictions for this simulation illustrates part of the problem with the model. If one distant independent signal is imported by cable, WEFA predicts that local households view the local independent signal 30 percent more often than the distant independent signal. However, if six distant independent signals are imported, WEFA predicts that local households view the local independent signal 33 percent *less* often than *each* distant independent signal.

[109] Additional comments of Association of Independent Television Stations in Dockets 20988 and 21284, filed January 10, 1980, Attachment A.

[110] *Id.* at 13.

[111] The two studies submitted by INTV in the inquiry stage of this proceeding which were undertaken by Roger Cooper and Associates are: 1) The Effect of Cable Carriage of Distant Signals on the Audience and Revenue of Local Independent Television Stations, dated May 15, 1978; and 2) Part 2 of: The Effect of Cable Carriage of Distant Signals on the Audience and Revenue of Local Independent Television Stations and on Their Ability to Provide Service to the Public, dated January 31, 1979.

[112] The results of the Cooper studies are premised on the audience diversion estimates provided by NAB-WEFA. The other relationship which the Cooper results depend on concerns the revenues that local stations receive. However, since Cooper's

105. INTV also has submitted a new study by Roger Cooper and Associates since the issuance of our *Report* that attempts to validate the results of the NAB-WEFA model.[113] Data on the shares of viewing of local independent stations in cab le and non-cable households are provided for a few selected counties within the stations' service area (abstracting from the associated levels of cable penetration in the counties). We have performed a case study analysis of each of the eleven stations for which data were presented because focusing on a few select counties can provide a distorted picture of the effect of cable television on local station audiences. We found that cable television does not pose a threat to any of these stations. [See case study discussion below at paragraphs 157 to 194.]

106. NAB-WEFA has supplied some information to Roger Cooper and Associates concerning a simulation which is similar to the case of the independent station operating in Buffalo, N.Y., which we have analyzed in our grandfathered market study. For this simulation, the NAB-WEFA model is employed to estimate audience diversion due to cable from an independent (which, however, is UHF) station with a very small non-cable share (i.e., 5 percent) that competes with three local network affiliates.[114] The NAB-WEFA model predicts that the local independent station's audience share will decrease by 38 percent in cable households if one distant independent station is imported and will decrease by 80 percent in cable households with six distant independent stations. In the Buffalo ADI, we note that the independent station also attracts roughly a 5 percent share of the non-cable viewing in competition with three local network affiliates. Additionally, this station competes in cable households against four distant network affiliates, three strong distant VHF independent stations, and three Canadian signals. Our analysis shows, however, that the local independent station in Buffalo actually is *helped* by cable television in its local market. This evidence, which is drawn directly from the actual viewing patterns supplied by Arbitron and is not an econometric

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revenue diversion estimates depend on NAB-WEFA's audience diversion estimates, they are biased. Nevertheless, Cooper's research concerning the revenues received by local stations was analyzed and we believe it is consistent with our conclusion that there is roughly a one-to-one relationship between the audience and revenue of television broadcast stations. Additionally, the estimates provided by Roger Cooper and Associates for the audience/revenue relationship of independent stations over the various day-parts have been employed by Park in his response to industry comments. (See Appendix B.) We also are aware of the study of Roger Cooper and Associates on the impact of cable television on local station audiences, by program, in San Diego and Bakersfield, submitted in the comments of Storer Broadcasting Company and McGraw Hill Broadcasting in this proceeding. We note that detailed case studies for both San Diego and Bakersfield are provided in the *Report in Docket 21284*, which constitute our response to this study.

[113] Association of Independent Television Stations, comments in Dockets 21284 and 20988, September 17, 1979, Attachment.

[114] Additional comments of Association of Independent Television Stations in Dockets 20988 and 21284, January 10, 1980, Attachment A.

projection based on questionable techniques, contrasts sharply to NAB-WEFA's predictions.[115] Thus, we believe this evidence demonstrates further that the NAB-WEFA model is inappropriate for assessing the effect of distant signals on local independent station audiences.

107. As described previously, our *Report* summarized the Park study by providing the predictions derived by Park of the incremental audience diversion due to relaxed signal carriage rules at both present and projected ultimate cable penetrations. For example, in the long-term Park predicts the incremental effect of eliminating the signal carriage rules to be as high as 41 percent for markets with one local VHF network affiliate. However, we discounted Park's long-term estimates because the projected ultimate cable penetrations employed to generate these estimates were overstated. For example, in markets with one local VHF network affiliate, Park projects an ultimate marketwide cable penetration of 84 percent by assuming every home will have access to cable television and by employing his earlier model on cable demand to predict cable penetration.[116] It should be noted, however, despite the fact that cable has grown to maturity in almost all one-station markets (*i.e.*, few cable systems have applied for franchises in the past few years in these markets), and that many of the cable systems currently ope-ating in the markets are carrying a large number of distant signals because of the grandfathering provisions of our rules, the average marketwide cable penetration in markets with one local VHF network affiliate currently is only 41 percent. Cable penetration is not expected to increase substantially in these markets because of the large areas of low population density contained therein. Thus, having discounted Park's values for projected ultimate marketwide cable penetration, we concluded that the predictions generated by Park's audience model suggest that there is virtually no scenario which generates a 20 percent audience loss within the foreseeable future from relaxed signal carriage rules.[117]

108. Capital City Television provides a list of thirty-one stations for which Park predicts a long-term incremental reduction in local station audience of 41 percent as a result of the elimination of the

[115] While this comparison is not perfectly valid because the independent station in Buffalo operates on a UHF frequency and the NAB-WEFA prediction is for a VHF station, the resulting disparity also is evident for other of our case studies. For example, while the VHF independent stations in Indianapolis and Seattle have much larger audience shares than the simulated 5 percent share in the NAB-WEFA example, they also are helped by cable television in their local markets.

[116] Park, *supra*.

[117] It should be noted that the conclusion of there being virtually no scenario which generates a 20 percent audience loss from relaxed signal carriage rules represents a summary interpretation of the Park audience model. That is, it accepts the estimates of audience derived from Park's estimation of an "attractiveness index" for various types of television stations as correct. However, as documented throughout the *Reports in Dockets 21284 and 20988*, and explained again below, we believe that Park's audience estimation technique results in an overstatement of the true impact of cable on local station audiences.

signal carriage rules and suggests that we have ignored his findings in this respect.[118] However, as noted, we have specifically rejected Park's long-term predictions, especially in one- and two-station markets, because the ultimate marketwide cable penetrations employed in these markets to measure the effect of cable are too high. Additionally, it should be noted that at the current level of 41 percent cable penetration for markets with one local VHF network affiliate, Park predicts only a 14 percent incremental audience diversion due to relaxed signal carriage rules. The cable penetration in these markets is not expected to increase substantially. Therefore, it is only the very few cases where cable penetration will exceed about 60 percent on a marketwide basis that Park predicts greater than 20 percent incremental audience diversion from relaxation of the signal carriage rules.

109. Our treatment of the long-term effect of the growth of the cable television industry is also found wanting by a number of the commenting parties. The Park study provides estimates of audience diversion due to cable under the current signal complement permitted by the FCC rules and under relaxed signal carriage rules. These estimates are provided at both current and projected ultimate cable penetration levels. In Table 4 of Section III of the *Report in Docket 21284*, we presented Park's predictions of the short run local station audience diversion due to relaxed signal carriage rules. The figures in this table represented the audience losses to local stations (in percentage terms) from additional distant signals at current levels of marketwide cable penetrations. These figures were derived by subtracting Park's estimates of local station audience in a deregulated market from Park's estimates of local station audience in a regulated market (both at current penetrations), and then, in order to determine the percentage loss, we divided these differences by the estimates of local station audience in a regulated market. In Table 5, to establish the upper boundary, we present Park's predictions of the long-term local station audience diversion due to relaxed signal carriage rules. The same procedure as before is employed here, except that all calculations of audience diversion are made at the projected ultimate cable penetrations. ABC claims that the audience diversion predictions in Table 5 do "not include audience losses from increased cable penetration."[119] This statement is simply untrue. In the first simulation in Table 5, for example, market cable penetration is predicted to increase from 28 percent to 37 percent *as a result* of the relaxation of the signal carriage rules.

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[118] We have analyzed each of these stations in our case study analysis, *infra*. ABC makes a similar point but includes a different list of stations. ABC lists, for example, WUHQ, Battle Creek Michigan as in a single station below top 100 market. The licensee of WUHQ in its comments, however, refers to the station as being in the 37th market.

[119] *Supra*, n. 89, at 19–20.

110. Several parties disagree with our calculations of the long-term local station audience diversion due to relaxed signal carriage rules from the Park study. For example, the Joint Motion contends that the audience diversion estimates "should be based on both the increase in penetration *over time* and the impact of carrying the specified additional signals (including three distant network affiliates)."[120] (Emphasis shifted.) This is equivalent to the difference (in percentage terms) between local station audiences at current cable penetration levels with cable systems operating under the current signal carriage restrictions and local station audiences at projected ultimate cable penetration levels without signal carriage restrictions, holding all other factors constant.[121] Such an estimate includes audience diversion attributable to the growth of cable television that will occur irrespective of the elimination of the Commission's cable rules, because even if we were to retain our distant signal carriage rules, marketwide cable penetration would increase over the long run. However, audience diversion attributable to normal cable growth should not be added to that resulting from the elimination of our signal carriage restrictions in assessing the effect of the elimination of the Commission's rules. Or, in other words, the estimates for the long-term audience diversion *due to* relaxed signal carriage rules should *not* include audience diversion attributable to increases in cable penetration *not due to* relaxation of the signal carriage rules. Instead, the appropriate focus for policy purposes is the effect that a *change* in Commission *rules* will have on local station audiences. These estimates derived from the Park model are provided for the near term in Table 4 and for the long-term (i.e., in the future) in Table 5. The alternative method presented in the comments for displaying this data can also be used but is, we believe, a less appropriate focus. And, as we have indicated elsewhere, it clearly is not appropriate to hold all other factors constant when we can reasonably expect that there will be offsetting factors.

111. In summarizing the work undertaken on audience diversion due to cable television in this proceeding, we concluded that in all but the most extreme cases, the additional audience loss to local stations from the elimination of the signal carriage rules will be less than 10 percent in the foreseeable future. A number of parties, however,

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[120] *Supra*, n. 92, at 21. The Joint Motion correctly identifies an error in the characterization of simulation 3 of the Park study as markets containing 1 rather than 2 UHF independents. This error has no bearing upon our conclusions reached from the Park study, however, because the estimated effect of cable on local UHF independent station audiences is unchanged by the correction.

[121] The contention of the Joint Motion implies that the calculation should be made assuming partial equilibrium conditions. That is, all of the other things that affect local station audience, except for cable, should be held constant. We have already pointed out, however, that other factors, such as population growth, almost always act to more than offset any audience losses attributable to cable television over time. *See* Section IV of the *Report in Docket 21284*.

question the validity of this conclusion. We believe these comments reflect a misunderstanding of our conclusion. When properly interpreted, our conclusion is acknowledged to be an inference that is drawn from *all* work on audience diversion due to cable in this proceeding—NCTA, MPAA, NAB-WEFA, Park and the case studies—*after* the necessary adjustments are made to the studies.

112. Thus, for example, we summarized the Park model as predicting an incremental diversion of no more than 20 percent from relaxing the signal carriage rules. However, we provided numerous reasons and examples, aside from the chosen levels of ultimate marketwide cable penetration, that demonstrate that Park's estimates of audience diversion are overstated. Notable among these are: 1) the assumption that local stations obtain 100 percent of the non-cable local audience; 2) the assumption that the "attractiveness index" for each station does not vary with the number of signal choices. This assumption results in the estimated effect of a sixth imported independent station to be a substantial fraction of the estimated effect of the first; and (3) the failure to control for the fact that many cable systems carry more than the standard complement of distant signals permitted because of the "grandfathering" and "significantly viewed" provisions of our rules. These shortcomings of the Park model are not inconsequential. For example, Park predicts an overall audience loss due to cable of 42 to 46 percent in Palm Springs, California, under current marketplace conditions. We find the actual audience diversion in Palm Springs to be between 10 and 20 percent, depending on whether or not the increased television viewing in cable households is attributable to cable television service. Additionally, in summary form, the Park model predicts audience diversion from relaxing the signal carriage rules to be roughly 30 percent for markets comparable to Palm Springs (see Simulation 9, Table 5, *Report in Docket 21284*). Yet, most cable systems in one- and two-station markets already carry many distant signals because of the grandfathering provisions of our rules. For these reasons, in addition to the use of unreasonably high ultimate marketwide cable penetrations, it is clear that Park's estimates of the incremental audience diversion due to the elimination of the signal carriage rules are overstated.

113. Finally, the comment is made that we eigher ignored the NAB, MPAA, and INTV studies or went to great lengths to include material critical of them and included virtually no criticism of either the NCTA or Park audience loss studies. However, contrary to this allegation, the studies by NCTA and Park received substantial criticism in the *Report in Docket 21284* at paras. 101, 112 and 113, and notes 110, 121, and 126. Additional criticisms of the Park study are provided in the *Report in Docket 20988*. Thus, we believe, and our *Reports* give every indication, that each study and comment in this proceeding has received serious and extensive consideration. Where the results of one study are criticized, for example, the predicted effect of

cable on independent stations in the NAB-WEFA study, we fully documented our reasons. Furthermore, ample opportunity has been provided to enable parties to comment not only upon our summary and analysis of the work submitted, but also on the case studies that were undertaken to scrutinize more carefully the allegations raised by the television broadcast industry. We also provided ample time for a second round of comments on the Park study, after minor adjustments were made by Park in response to industry comments. We believe our procedures in this proceeding extend well beyond the guidelines established by administrative procedural law.

114. But, what is most important to be aware of in assessing our determination of the incremental audience diversion from the elimination of our signal carriage rules is the fact that we have actual marketplace experience with local television stations operating in markets with extraordinarily high cable penetration and a large number of distant signals. In most of these cases, *total* audience diversion due to cable (including that from the large number of distant signals) is less than 10 percent. Furthermore, it is extremely rare to have the *total* audience diversion due to cable being greater than 20 percent, even in cases with extraordinarily high marketwide cable penetration and a large number of distant signals. Therefore, in conclusion, we are confident that the *incremental* audience diversion from eliminating the rules will be less than 10 percent in the foreseeable future for all but a very few cases.

115. *The Park Study.* As we pointed out earlier, the Park study done under contract to the Commission was one of several studies that we relied upon in arriving at the consensus effect of cable television on local station audiences. Since numerous criticisms of the Park study are provided in the comments, we contracted with Park to permit him an opportunity to respond to these criticisms. We have reviewed the comments on the Park study, his response to them, and the response of the parties to his response, and will discuss them as indicated below.

a. Definition of local and distant signals.

116. The Joint Motion questions the findings of the Commission by saying that "basic to the Economic Inquiry Report was acceptance of Dr. Rolla Park's definition of 'local' and 'distant' signals" and "that the use of [ADI] assignments in individual counties provides a distorted, skewed definition of 'local' and 'distant' stations."[122] Before addressing the merit of Park's definition, we would like to clarify, once again, that

[122] *Supra* n. 92, at 12–13. The Petitioners also note our reliance upon the Park study in the *Report in Docket 20988*. On page 34 of that Report we said "we are relying upon Park's estimates (as opposed to other work on cable impact) because the total audience impact of cable for various complements of local and distant signals is readily available in his work and because we found in the *Report in Docket 21284* that his results are broadly consistent with other studies of audience impact." This statement was included simply to point out that other studies could have been used, but the results would have been similar.

Park's study was not relied upon exclusively for our conclusion regarding audience impact. In fact, Park himself suggests that the studies be regarded as "complements rather than competitors." (*Economic Inquiry Report*, p. 755). As noted previously, we made use of four studies provided by outside parties in addition to our own staff analysis. We believe that the similarity of the results of these studies, when they are interpreted correctly, despite the use of different data and methodologies, lends credence to our reliance upon the general consensus derived from them.

117. As to the merit of Park's definition of local and distant signals, we find it acceptable. Despite the claim in the Joint Motion that "the Park methodology fails to distinguish between signals which are truly 'local' in a particular county and those which are accessible only to cable system subscribers," they fail to come up with a superior definition. In fact, an audience study submitted in this proceeding by one of the petitioners of the Joint Motion (MPAA) employed a definition of local signals which is strikingly similar to Park's.[123]

118. In an attempt to discredit Park's definition of local signals, the Joint Motion identifies several local commercial stations in Park's sample that have audience shares of zero in non-cable homes. The Joint Motion contends that a signal cannot be considered local to an area if it receives no off-the-air viewing. We, however, agree with Park in that "it is a fact of life that some stations get little or no audience in some parts of their own markets. One of the benefits of cable is that it improves reception so that these stations can attract some audience in previously dead areas."[124] Therefore, we do not believe that Park's assignments provide a distorted, skewed definition of local and distant stations. Nevertheless, we respect the contention that "although the precise impact of such errors cannot be determined [by ourselves] they are clearly significant in establishing the need for careful, objective review of the Park study in view of the Commission's reliance on the findings of this study."[125] To address this concern, Park excludes, in his revised analysis, all local stations in his sample that receive a zero share of non-cable viewing in their own market. Park's finding, after also making adjustments for other minor problems with the sample, is that "excluding these stations makes very little difference to the

[123] In its study, MPAA states that "We define 'local stations' as those stations in an ADI which collectively achieve a minimum share of 75 percent of non-cable household viewing, on a Total Day Basis." (Emphasis omitted.) Motion Picture Association of America, Reply Comments, Docket 21284, June 20, 1978 at 4. In comparison, Park required that local stations attract at least 70 percent of the total off-the-air audience in the sample counties selected from their ADI.

[124] R. E. Park, "Audience Diversion Due to Cable Television: Response to Industry Comments," the Rand Corporation, Santa Monica, California, a Rand note prepared for the Federal Communications Commission, November 1979 at 16. Attached as Appendix E.

[125] *Supra*, n. 92, at 15.

projections, and what difference there is, is usually in the direction of *less* diversion."[126] Thus, we believe that Park adequately has addressed the problem raised by the Joint Motion with respect to his definition of local and distant signals. Local stations with zero shares in non-cable households should remain in the sample when providing the preferred audience diversion estimates. Several parties, however, remain unsatisfied with Park's definition of local signals. MPAA, for example, advances several new problems with the definition. It identifies 13 additional counties in which a local station has a non-cable share ranging from 1 to 5 percent.[127] MPAA questions the reasonableness of these data, and, presumably, would prefer that these stations also be excluded from the analysis. We do not find this position surprising. MPAA questions the use of these data because it is precisely these stations which are helped by cable television. But, since a real effect that cable television has on some local stations is to increase the audience they receive in portions of their local markets, it would be invalid to attempt to eliminate this effect from the analysis. While there certainly can be different definitions of the term "local," and indeed there does not appear to be one definition for all purposes, we believe Park's definition to be a reasonable one which does not distort or skew his analysis and which is statistically acceptable.

b. Day-parts.

119. Of the five major audience studies in this proceeding, only two, NAB-WEFA and MPAA, provide detailed estimates of audience diversion from cable for all day-parts (i.e., day, early fringe, prime time, late night). These two studies show that audience losses due to cable are greatest in the early fringe time period (*i.e.*, 4:30 - 7:30 p.m., Eastern Time, Monday - Friday). On the other hand, the studies by NCTA and Park, and the case studies undertaken by the Commission staff, focus primarily on the effect of cable on local station audiences over the entire day without any explicit adjustment or allowances for differences in viewer behavior in the four day-parts.

120. The broadcast industry's response to this treatment of audience diversion is that "the Commission's failure to consider Fringe Time audience losses in its major study of audience loss is a significant and prejudicial omission."[128] In an attempt to substantiate this claim, NAB submitted a modification of the previous work submitted by

[126] Appendix C, at 17.

[127] Motion Picture Association of America, Further Comments in Dockets 20988 and 21284, January 10, 1980. MPAA also questions the shift in local market assignments for some stations in the sample resulting from Park's revision to take network non-duplication into account. We address this criticism separately below.

[128] Joint Motion, *supra*, n. 92, at 19.

Charles River Associates concerning the audience/revenue relationship of television broadcast stations.[129] The results of this study suggest that the value of viewing households to local broadcast stations differs depending upon the day-part in which the viewing occurs. For example, CRA estimates that a viewing household is worth approximately 45 percent more revenue to a network affiliate during early fringe than prime time. In comments submitted by INTV, Roger Cooper and Associates also demonstrate a skewed audience/revenue relationship for the different day parts of independent stations.[130] In light of this belief that "impact in terms of Fringe Time is critical,"[131] we requested Park to determine whether estimates of audience diversion from cable for the entire day would differ if "worked-up" using audience survey data provided by Arbitron for each day-part. We also hoped to answer the question of whether the skewed audience/revenue relationship of television broadcast stations, in conjunction with the larger impact of cable television on local station audiences during early fringe, would cause a significant difference between the audience effect and the revenue effect of cable television on local broadcast stations over the entire day.

121. The results of Park's analysis confirmed that the impact of cable television on local stations' audiences and revenues would not change significantly if the estimates were developed from audience and revenue data for each day-part. In fact, Park finds that "audience projections are not affected by taking into account differences in diversion among different periods of the day."[132] Park also finds that "any differences between [the] revenue projections and the audience projections . . . are no larger than one percentage point. The exception is projections for independents using Charles River weights."[133] However, Park finds that the "revenue projections using Roger Cooper weights are almost the same as the audience projections."[134] In comparing these two results, it should be noted that the difference between the audience effect and the revenue effect of cable on UHF independents over the entire day when using the CRA audience/revenue estimates is due, in large part, to the perverse results generated by the CRA model. The CRA model estimates that an independent station *loses* revenue for every household watching the station during late fringe and earns approximately *fifteen times more*

[129] National Association of Broadcasters, Reply Comments in Dockets 20988 and 21284, October 17, 1979.

[130] *See* n. 94, *supra*.

[131] Joint Motion, *supra*, n. 92, at 18.

[132] Attachment B, at 27.

[133] *Id.* at 22.

[134] *Id.* at 27.

revenue for each viewing household during early fringe than during prime time.[135] These findings defy both logic and our general understanding of the broadcast industry. Although we previously rejected the audience diversion projections of Roger Cooper and Associates because they were derived from the NAB-WEFA model, we are inclined to rely more heavily upon the estimates of the audience/revenue relationship supplied by Roger Cooper and Associates in assessing the revenue diversion from local independent stations because these estimates were derived independently from the NAB-WEFA model and do not contain the same flaws.[136] If the results of the Cooper study of the audience/revenue relationship for independent stations are relied upon, then the impact of cable television on the audiences and revenue of local broadcast stations that is estimated from data for the individual day parts usually is equal to, and is never more than three percentage points greater than, the impact of cable television on local station audiences that is estimated from data for the entire day. This omission seems to us to be neither significant nor prejudicial. In summary, use of audience data for the entire day is adequate for estimating the impact of cable television on local station audiences. The effect of cable on station audiences calculated from data for the entire day will be equivalent roughly to the actual effect on station revenues, just as we have previously assumed.

c. Non-duplication protection.

122. The Commission's rules specify that cable systems must provide "local" network affiliated stations protection, upon request, from lower priority distant stations that are simultaneously broadcasting the identical network programs.[137] In estimating the effect of cable on local station audiences, Park did not distinguish whether the distant network signals imported by the cable systems in his sample were being blacked out in accordance with our non-duplication rules. In Dr. Franklin Fisher's analysis of the Park study, submitted in the Joint Motion in this proceeding, he concludes that "one cannot tell the extent to which the reported results depend on this. Both the total audience equation and the audience share equation may be affected in any or all of their coefficients to greater or lesser extent by this problem"[138] The Park model as revised, however, explicitly takes into

[135] The finding of lost revenue during late fringe is not significantly different from zero, but the fact of an "unbiased" negative estimate remains.

[136] It should be noted that in NAB's reply to the Park revision, dated January 10, 1980, Dr. Fisher seems to argue that the CRA estimates are preferable because they are derived from an econometric study. Here, however, Roger Cooper and Associates have collected data *directly* from twelve independent stations. These stations provided the percentage distribution of their revenues over the various day-parts. With these data, there is no need for econometric modeling.

[137] For further clarification of these rules, *see* 47 C.F.R., Part 76, Subpart F.

[138] *Supra*, n. 92, Attachment at 15.

account non-duplication afforded to local stations. After making the necessary adjustment for stations that get protection and for stations that are blacked out to provide protection, Park finds this adjustment "does not change the audience diversion projections very much from those in my earlier report."[139] Hence, the question raised concerning the extent to which the results previously reported by Park depend on the protection afforded by our non-duplication rules has been answered. There is no significant change.

123. Nevertheless, NAB contends that the Park revision fails to provide any "indication of the effect of carriage of multiple non-simultaneous duplicate network programs."[140] Similarly, we also are aware of the contention of some parties that our non-duplication rules would be rendered ineffective if network affiliated stations were permitted to be imported from other time zones. It should be noted, however, that not one party has presented any evidence concerning the effect of non-simultaneous duplicate network programs. Nevertheless, we are fortunate to already have considerable marketplace experience with non-simultaneous or pre-released network programming.[141] Analysis of these situations leads us to believe that the public will be served best without additional restrictions on viewer choices emanating from an expansion of our non-duplication rules. Finally, we must point out that these contentions address the question of the appropriate scope of our network non-duplication rules, and not our signal carriage rules. We have specifically and consistently stated that an analysis of the network non-duplication rules is beyond the scope of this proceeding.[142] We note that to the extent that parties wish to address the merits of the network non-duplication rules, a channel is available to them through petition for rulemaking.

124. Some parties also had difficulties with Park's methodology for adjusting non-duplication protection. For example, INTV asserts that

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[139] *Supra*, n. 124, at 23. Park notes further that "if one further assumes that distant primary network signals are just as attractive as local affiliates, the projected diversion due to cable in one- and two-station markets is increased, but the projected incremental diversion due to relaxing present rules is decreased." For policy purposes, we are interested in the incremental effect of relaxing the rules. Thus, to be conservative, we prefer the estimation procedure which will overstate the incremental effect. The estimates using this procedure (See Appendix B, Tables 3 and 4) are relied upon when we assess the Park model. To this extent, Fisher's criticism of Park's further assumption is rendered moot.

[140] National Association of Broadcasters, Comments in Docket 20988 and 21284, January 10, 1980, at 15.

[141] In addition to our case study analyses in this proceeding of local television stations that are operating in competition with pre-released programming on cable television systems, see the *Second Report and Order in Docket 19995*, 54 FCC 2d 229 (1975). *See* also our *Report in Docket 20649*, FCC 79–780 (1979).

[142] *See, Notice of Proposed Rulemaking in Dockets 21284 and 20988*, para. 5.

"Dr. Park does not explain how he determined which stations receive non-duplication protection."[143] We note, however, that this explanation is provided by Park on page 52. [See Appendix C]. Additionally, MPAA finds "*many* instances where the blackout' notations inserted by Park defy reason."[144] For example, MPAA questions "on what basis is KXII entitled to non-duplication protection [in county #17 (Bryan, Oklahoma)] while KTEN is not?"[145] This question reveals a lack of understanding of our non-duplication rules. Ardmore-Ada is a hyphenated market. The cable system in Bryan, Oklahoma is further than 55 miles from station KTEN, Ada, but is within the 55 mile zone of protection of KXII, Ardmore. Thus KXII is entitled to protection and KTEN is not.[146]

125. MPAA also states that " *if we were asked to single out one case to illustrate the inaccuracy, unreasonableness, and prejudicial nature of the Park Study, we would rest our case on county #30* [Jackson, Alabama]."[147] (Emphasis in original.) We believe this statement demonstrates the lack of understanding with which MPAA has attacked the Park study. Therefore, we believe it useful to provide some extended discussion of the data for Jackson County. Park's designation of stations being either local or distant in his original study in this proceeding was determined by Area of Dominant Influence or ADI. Stations assigned by the Arbitron audience rating service to an ADI were considered local in all areas of that ADI. However, to avoid including counties near the fringes of an ADI, Park excluded counties from his sample in which the local stations received less than 70 percent of the non-cable viewing. Although MPAA did not provide an alternative method for defining local signals, and in its major study of audience diversion in this proceeding it employed a definition of local signals which is very similar to Park's,[148] MPAA found Park's definition to be unacceptable. Presumably, MPAA would prefer Park to have restricted the local area of a station to those areas which are even closer to the community of license. Interestingly, Park's revision of his definition of a local signal to account for non-duplication protection *did* have this effect in some cases. One such case is county #30 (Jackson, Alabama). Originally, Park considered the stations operating in Chattanooga, Tennessee to be local in Jackson County, Alabama because of the county's assignment to the Chattanooga ADI.

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[143] Additional comments of the Association of Independent Television Stations, Inc., filed in Dockets 20900 and 21284, January 10, 1980 at 4.

[144] Further comments of Motion Picture Association of America, Inc., filed in Dockets 20988 and 21284, January 10, 1980 at 9.

[145] *Id.* at 9.

[146] *See* 47 C.F.R., Part 76, Subpart F. Appendix C to the *First Report and Order in Docket 19995*, 52 FCC 2d 519 (1957) contains an explanation of the rules in this type of situation in diagram form.

[147] *Id.* at 10.

[148] See note 123 *supra*.

However, since the cable system in Jackson County is within the 35 mile zone of the station in Huntsville, Alabama and these stations receive non-duplication protection against the Chattanooga stations, Park has reclassified the Huntsville stations as the local signals for this county. But, as it turns out, cable television increases substantially the audience of the Huntsville stations in Jackson County. Therefore, for this case, MPAA argues explicitly that the stations further away from Jackson County should be designated the local stations for this county. While it demonstrates the difficulty of finding perfect definitions of local and distant signals, we find MPAA's conclusion with respect to the definitions used to be not only unreasonable, but inconsistent with their previous criticisms of the Park study.[149] In summary, we reject the commenting parties' criticisms of both Park's definition of local signals and his procedure for dealing with non-duplication protection.

126. Additionally, in its comments on the Park revision, INTV argues that the revisions altered the results significantly.[150] This argument also is without merit. Park summarizes his revision by saying "although the new estimates differ from the earlier ones in a number of ways, the resulting audien e diversion projections are changed very little."[151] The appropriate comparisons are Tables 7 and 8 in the original report and Tables 3 and 4 in the revision, respectively. The difference is no greater than three percentage points for any of the simulations.

d. Total Audience Model.

127. The Park study estimates a total audience model and an audience share model to generate audience diversion projections. The total audience model is formulated to test the hypothesis that the increased viewing in cable versus non-cable homes is attributable to the tendency of heavier viewers to subscribe to cable television (*i.e.*, the self-selection hypothesis). If the hypothesis is true, the greater amount of viewing observed in cable versus non-cable homes is not attributable to cable television, and therefore cable has the potential to divert more audience from local stations. After testing this hypothesis, however, Park concludes that he has "not succeeded in settling the question of whether or not cable should get the credit for higher viewing in cable homes."[152] Faced with this limitation, Park proceeds to provide a range of estimates of audience diversion from cable

[149] Previously, for example, MPAA argued in the Joint Motion (*supra*, at n. 92) that Park disregarded the distance between the local stations and the cable systems in the sample. It was noted that the Grade B contour of KXON is at least 100 miles short of Brown County (which Park considered local to KXON).

[150] *Supra*, at n. 143, at 6-7.

[151] Park, Appendix A, *Report in Docket 21284* at 3.

[152] Park, Appendix A, *Report in Docket 21284* at 23.

television by making the alternative assumptions that cable gets all of and none of the credit for the higher viewing in cable homes.[153] However, Park finds that "the question of which assumption is correct (or where, in between, the truth lies), although interesting, turns out not to be too important" because "the range of values calculated by using the extreme assumptions is quite narrow, usually only two or three percentage points wide."[154]

128. Upon reviewing the Park study, Dr. Fisher finds "Park's total audience equations . . . to be very unreliable."[155] Fisher also finds that "the obviously unsatisfactory audience equation can make a substantial difference [in projections of audience diversion]."[156] As it turns out, however, the example that Fisher uses in attempting to demonstrate this substantial difference is arithmetically in error.[157] Thus, we find Fisher's criticism to be without merit.

129. To summarize our position on this question, we continue to believe that "we can do no better than provide upper and lower bounds on the magnitude of audience diversion which has resulted from the presence of cable."[158] Hence, we rely upon both share and rating data (in a procedure identical to Park's) to reach our conclusions. For example, in our grandfathered market analysis, we found that the broadcast stations in the San Diego television market lose approximately 1 to 4 percent of their potential audience because of cable television.[159] That is, they lose one percent if the greater amount of viewing in cable homes is attributable to cable television; four percent, if not.

e. Signal Reception.

130. New data on the television viewing of cable and non-cable households are available for individual counties. These data provide a substantial improvement over previously available marketwide viewing data because signal reception differences between households within each unit of observation (i.e., the county as opposed to the entire market) are reduced significantly. Even so, Dr. Fisher argues that "some stations cannot be seen in all of the county from which the data come" which "will directly affect the audience diversion estimates."[160] Fisher contends that "the results can be substantially affected."[161] We believe Park's decision onthe point to be entirely reasonable. For our

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[153] This procedure also was employed in our detailed case study analysis in the *Report in Docket 21284*.

[154] *Supra*, n. 124, at 23.

[155] *Supra*, n. 92, at 2.

[156] *Id.* at 11.

[157] *See* Park, *supra*, n. 124, at 28.

[158] *Report in Docket 21284* at n. 136.

[159] *See* the *Report in Docket 21284* at Table 2-3 of Section IV.

[160] *Supra*, at n. 92, at 15, 17.

[161] *Supra*, at n. 92, at 19.

purposes, however, it is sufficient to note that while the Park and NAB studies choose different methods for dealing with reception differences across counties, they come out with similar results, suggesting that adjusting for receivability does *not* affect the results substantially. This conclusion is given further support by comparison of the results of the previous studies that employed marketwide viewing data, the current studies that employ county wide viewing data without adjusting for reception quality, and the study by Video Probe Index[162] which restricts the areas from which viewing data are drawn to particular communities. Clearly, the reception quality of the signals viewed off-the-air differs significantly between the households comprising each unit of observation (i.e., market, county, community) in these studies. Yet, here again, the fact that the results of these studies are broadly consistent leads us to conclude that adjusting for receivability in a study of audience behavior is not very important to the "bottom line" estimates. Hence, we find Fisher's criticism to be overstated and, as a result, we do not believe it is necessary for Park to account for receivability in his study.

131. INTV attempts to take the signal reception argument one step further by contending that "any proper measurement of audience impact due to importation of distant signals must assume equality of reception in cable and non-cable homes in order to eliminate improvement in reception as a variable."[163] We believe this contention is unreasonable. An important effect that cable television has on local stations is an improvement in their signal reception and an expansion in their coverage area. For example, in our analysis of independent stations that operate in markets with high cable penetration,[164] we found that the UHF independent stations analyzed receive audience gains from cable television within their own ADI, despite the carriage of at least 5 distant signals. Therefore, to eliminate improvement in reception is to eliminate an important effect of cable television on local station audiences from the analysis. Hence, we reject INTV's contention.

f. The Sample.

132. The sample for Park's study of audience behavior between cable and non-cable households was selected by the Commission staff. The primary criterion in selecting the sample was that each unit of observation (*i.e.*, each county) have consistent viewing options on cable. In this manner, the relationship between the availability of distant signals and viewer behavior could be monitored carefully. To insure this consistency of viewing options on cable, the Commission staff

[162] See National Cable Television Association, Comments in Docket 21284, March 15, 1978, Exhibit D.

[163] *Supra*, n. 113, at 18.

[164] *Report in Docket 21284*, Section IV.

limited the sample to all those counties that contain only one cable system. Additionally, it was required that viewing data be available for both cable and non-cable households in each county. Finally, the sample was restricted further by excluding those cable systems (*i.e.*, counties) that provide syndicated exclusivity protection to local broadcast stations.[165] Upon receiving a sample of 166 counties from the Commission, Park excluded an additional forty-five counties located near the fringe of their markets. Local stations were required to attract at least 70 percent (and actually received on average 92 percent of the total off-the-air audience in the sample counties.

133. Several parties have questioned the adequacy and representativeness of the Park sample. For example, Fisher concludes that "the gain in 'cleanliness' [from restricting the sample to counties with only a single cable system] does not seem worth the sacrifice of large amounts of information and of the representativeness of the sample of counties."[166] We do not believe that the choice between selecting a sample for its cleanliness or its representativeness was an unreasonable one. In reviewing the signal carriage of cable systems for our case study analysis in the *Report in Docket 21284*, we found frequent and significant differences in the signal carriage of cable systems located within the same county. Therefore, one also may argue that the other audience studies in this proceeding suffer because of a lack in cleanliness in their samples. Indeed, if Park had chosen to expand his sample at the cost of cleanliness, the commenting parties just as easily could have criticized his judgment. It is apparent to us that there is no perfect solution to the problem. This is typical of all econometric work. Of primary importance, however, is the fact that studies employing different selection criteria for their samples come out with generally consistent results. This provides us reason to believe that the selection criteria for choosing a sample (if not purposely biased) will not influence significantly the magnitude or direction of the estimates. From our perspective of viewing all of the studies on audience diversion in the record, the cleanliness of the data for the Park study is worth its costs.

134. The Park sample also has been criticized for not having enough local independents. Park does not deny this criticism, nor the criticism that his estimation procedure will fail to properly estimate diversion from local independents. He states that "the question of

[165] While this degree of control was not interjected explicitly into the other studies of audience diversion in this proceeding, all of the studies are roughly indicative of a marketplace functioning without syndicated exclusivity protection. (*See* the *Report in Docket 20988* at para. 56.) Thus, to the extent that distant signals do not affect adversely the television service provided by local broadcast stations, this implies that the syndicated exclusivity rules are not necessary to stem any adverse consequences to consumers emanating from additional competition to local broadcast stations.

[166] *Supra*, n. 92, at 19.

whether or not independents lose a larger share of their audience than do affiliates is probably unanswerable by statistical methods until we have accumulated more experience with cable systems carrying distant signals into large markets."[167] As it turns out then, both the NAB-WEFA and Park models suffer from data limitations and methodological problems in assessing the incremental effect of additional distant independent signals on local independent station audiences. Hence, our summary of the results of these studies for markets containing independent stations is restricted to the provision of only one estimate of impact for the entire market. Additionally, it should be noted that for policy purposes, we can rely more confidently on the results of our case study analysis, which reflects actual marketplace experience, in assessing the effect of cable television on independent stations than on the NAB-WEFA and Park studies.

135. Finally, in its response to the Park revision, MPAA alleges that numerous problems exist with the data for the Park study. For example, MPAA states that "in our opinion, the Park study—as initially presented and as modified—is a classic example of the failure to recognize that the conclusions arrived at from an analysis of insignificant, unreliable data are also insignificant and unreliable. The underlying problem, we believe, is the very small number of valid diaries in the Arbitron samples for the vast majority of the counties used by Park for this analysis."[168] We believe this statement reveals a lack of appreciation and understanding of statistical analysis. At first blush, we note that the number of diaries in Park's sample exceeds substantially the number of diaries that A. C. Nielsen collects for its weekly survey of total nationwide viewing patterns. Thus, without elaborate explanation, it should be obvious that "smallness" of sample size for statistical estimation does not imply inadequacy of sample size.[169] MPAA also argues that the size of the sample can affect Park's findings. However, here again, MPAA fails to consider a basic tenet of statistical analysis. That is, there always is some variation introduced

[167] *Supra*, n. 124, at 38.

[168] Further comments of Motion Picture Association of America, January 10, 1980, Attachment at 1.

[169] MPAA notes that Park's sample includes 79 counties for which there are less than 50 in-tab diaries. In an attempt to discredit the Park study, it compares Park's sample composition which is based on Arbitron's sampling procedures for countywide viewing to the procedure employed by A. C. Nielsen for its marketwide viewing surveys. It should be noted that these Nielsen surveys are not equivalent to the Nielsen nationwide survey mentioned above. The appropriate sampling procedure for a survey will differ depending upon the population that one is trying to estimate. Indeed, MPAA's comparison of Nielsen's procedure for estimating marketwide viewing to Arbitron's procedure for estimating countywide viewing is invalid. For example, Nielsen does not report audience data for any market if the number of in-tab diaries is below 50 because such a response signifies that a relatively small proportion of the households in the survey have responded. However, this is not necessarily, nor even likely to be, the case if less than 50 diaries are returned for a county.

by taking a sample of an entire population. But sample size affects only the statistical significance of the estimates, and not the expected value of the estimates.[170] Indeed, we note that despite the alleged scarcity of in-tab diaries, Park's estimate coefficients are estimated quite precisely in a statistical sense. Finally, we note that for sample size to affect Park's results significantly, there must be a systematic bias in measurement by Arbitron at varying sample sizes. We are not aware of any such bias.

136. MPAA also questions the accuracy of the data provided by Arbitron. For example, MPAA contends that the "inconsistencies between 'shares' and 'Net Weekly Circulation' data are so substantial and so numerous, we believe that *all* NWC figures should be eliminated from the econometric manipulation which are basic to the Park study."[171] We note, however, that Park does not employ NWC data for any of his estimates. Furthermore, given the intensive scrutiny that the data used by Park has received, we believe that the cleanliness of this data far exceeds that of most econometric analyses. Therefore, we find frivolous MPAA's "conviction that the Park study is science fiction."[172] We note, once again, that we believe our "consensus effect" is a sound conclusion derived from *all* of the available evidence *and* from the careful analysis and interpretation of that evidence.

137. *Additional Miscellaneous Comments.* A number of additional comments relating in part to the econometric studies and in part more generally to our *Economic Inquiry Report* were also received. For example, ABC criticizes us and the Park study for "assum[ing] the same availability of program product in the future, despite evidence that the siphoning of major sports and other highly attractive program product from television broadcasting to CATV is highly realistic and would greatly affect projected audience diversion and resultant revenue losses."[173] We are not aware of any persuasive "evidence" of this shift in program product taking place. And it should be noted that even if this phenomenon were to occur, it is unlikely that Park's audience diversion estimates would be affected substantially, for if it were to occur, it would not affect materially the relative attractiveness of local broadcast stations vis-a-vis distant broadcasting stations because all broadcast stations presumably would be subject to the same programming shifts. The relative attractiveness of distant versus local stations is the relevant focus of the Park study. In addition, since no evidence has been presented to us which suggests that siphoning will

[170] *See, e.g.*, Mood, Graybill and Boes, *Introduction to the Theory of Statistics* (1974).
[171] *Supra*, n. 168, Attachment at 6.
[172] *Id.* at 5.
[173] *Supra*, n. 89, at 22.

occur, we do not believe it is appropriate for us to factor any alleged adverse effect of siphoning into our analysis of station profitability.[174] Others suggest that loosening of restrictions on broadcast signal carriage will result in decreased carriage of nonbroadcast programming and an overall decrease in diversity of program content. We find no evidence to support this view.

138. In our *Notice of Proposed Rulemaking in Dockets 21284 and 20988*, we addressed a petition from the National Association of Broadcasters requesting the Commission to commence rulemaking leading toward the adoption of rules designed to insure that local television broadcast service is not harmed by the development of superstations. We denied that petition because of the lack of any evidence that a regulatory problem exists or is being fomented. Nevertheless, INTV, in its latest comments in this proceeding, claims that "satellite distribution of signals has created unforeseen inequities that mandate retention of the rules."[175] INTV claims that "independent stations, and particularly UHF independents, are disproportionately sensitive to audience loss,"[176] INTV also maintains that "satellite carriage often impacts to the superstation's detriment as well."[177] However, as in NAB's petition, the facts supporting these arguments are either missing or incorrect. For example, one of the most significant findings of the *Report in Docket 21284* was that UHF independents frequently are *helped* by cable in their local markets, even in instances where many distant signals are carried by cable. Thus if satellite carriage increases the demand for cable television it may help UHF stations. Additionally, our conclusion for audience diversion due to cable applies to the importation of television signals currently distributed by satellite as well as by other means. It is the number and type of distant signals that affect local station audiences and not the means by which they are imported. Furthermore, in the *Report in Docket 20988*, we concluded that it is likely that superstations will receive some measure of compensation for the audiences they attract in distant communities. Thus, satellite carriage may be beneficial, rather than detrimental, to superstations. Nevertheless, it is the public interest that is paramount here, and not financial well-being of any one particular kind of station.[178] Here again, no facts have been

[174] See *Home Box Office, Inc. v. FCC, supra*, at 42.

[175] *Supra*, n. 113, at 54.

[176] *Id.* at 54–55.

[177] *Id.* at 56.

[178] We are aware, for example, that INTV requests the retention of the rule because of "unforeseen inequities." More specifically, competition from cable is said to be more keen for independent stations than for network affiliates. However, we are aware of no statutory mandate that requires us to consider the equities involved in shifting profits among firms. In fact, the U.S. Court of Appeals, District of Columbia Circuit in *Carroll Broadcasting Co. v. FCC*, 258 F. 2d 440 (D.C. Cir. 1958) concludes that "the question whether a station makes $5,000, or $10,000 or $50,000 is a matter in which the public has no interest so long as service is not adversely

presented which suggest the public will be disserved by the satellite carriage of programming.

139. NAB criticizes the Commission for "its failure to consider numerous and related factors which may compound the adverse impact on broadcast service—namely, audience fragmentation due to pay television, reallocation of advertising expenditures from broadcast to cable television, and audience and advertising reduction which may result from such services as satellite to home broadcasting."[179] This proceeding addresses the effect of the distant signal carriage and syndicated exclusivity rules on television service to the public. Our methodological approach has been to ascertain the amount of audience diversion that will occur in the absence of the rules and to determine whether these losses, if any, will affect the service from television broadcast outlets. With this in mind, pay cable and other services emerging in the market are relevant to this proceeding only to the extent that they will affect television broadcast profitability. At this point we are lacking any evidence that they do.[180]

140. In addition, cable systems do not compete significantly in advertising markets. For example, even though almost one out of five households in the nation subscribed to cable television, advertising revenues for the cable television industry were less than one tenth of one percent of those of the television broadcast industry in 1978. Thus, we do not envision that the growth of cable television will compound any adverse impact that cable may have on television stations' profits by siphoning advertising revenues from broadcast stations for cable systems.

141. NAB also alleges that "the Commission has made no attempt to consider how . . . carriage of specialty stations carrying substantial amounts of syndicated programming will increase the degree of program duplication dramatically."[181] However, as noted in para. 63 of the *Report in Docket 21284*, we previously had determined that the cable carriage of specialty stations would contribute to the welfare of consumers, while not adversely affecting the ability of commercial broadcasters to provide a satisfactory level of service to the public. Moreover,our conclusion in this proceeding is that the unregulated cable carriage of syndicated programming also will act to promote the

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affected." It is clear that our mandate is to best judge that which is in the public interest. The criteria we employ to make this judgment are described in the first section of this *Report and Order*.

[179] *Supra*, n. 93, at 111.

[180] We are aware that some parties have submitted partial summaries of the data in the "Nielsen Pay Cable Report." We are unable to ascertain the effect of pay cable television on local station audiences from the data submitted. However, other studies suggest that pay cable will not affect significantly the audiences of local television stations. *See* the survey by Video Probe Index, *supra*, n. 162. *See* also *Stations KMIR-TV and KPLM-TV*, 66 FCC 2d 576 at 582-3 (1977).

[181] *Supra*, n. 93, at 143.

public interest. Nothing has been presented here to suggest that our decision in 1977 to permit unlimited cable carriage of specialty stations was incorrect.[182]

142. Capital City Television *et al.* finds it "curious that the Commission has so far shown little regard for these smaller market broadcasters, and instead has focused in its conclusions almost exclusively on impact on big city television stations." However, to the contrary, the work on audience diversion due to cable in this proceeding has focused in large measure on small market stations. For example, Dr. Fisher and MPAA categorize the Park sample as being geared mostly to smaller markets. NCTA analyzed all markets with greater than 33 percent cable penetration. The majority of these markets rank below one hundred. NAB-WEFA and MPAA, by analyzing most if not all counties with greater than 10 percent cable penetration, also incorporate a substantial amount of information on audience diversion due to cable in smaller television markets in their studies. Lastly, we focused on smaller television markets throughout our case study analysis. Our conclusions are directed appropriately to both big city and small market television stations.

143. One commenting party, WBOC-TV, went so far as to request "a replication study of the statistical analysis contained in the 'Economic Inquiry,' using data for the years in question supplied by Arbitron's competitor, A. C. Nielsen, Inc."[183] Replication of the statistical analysis undertaken to date in this proceeding easily could add more than another year to the termination date of this proceeding. The gain in accuracy that *might* occur certainly is not required at this point. After almost three years of study, we have been presented with no good reason to believe that Arbitron data is less reliable than Nielson data, since the estimates supplied therein are in statistical tolerance of each other. Thus, we do not find it desirable to further delay the conclusion of this proceeding in order that a very small degree of confidence might be added to its conclusions.

144. *Summary.* Our *Report in Docket 21284* concluded that the incremental audience losses to local broadcast stations from eliminating the signal carriage rules will be less than 10 percent in the foreseeable future except for the most extreme cases. This conclusion was drawn from all of the substantive work on audience diversion that was undertaken for this proceeding—NCTA, MPAA, NAB-WEFA, Park and the case studies—after necessary adjustments were made to the studies. It is important to note that no new study has been submitted which suggests that this conclusion is incorrect. In fact, the majority of comments on the *Report in Docket 21284* consist of criticisms of only one of the five audience studies—the Park study.

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[182] *See* the *First Report and Order in Docket 20553*, 58 FCC 2d 442 (1976).

[183] WBOC-TV, Comments in Dockets 20988 and 21284, September 17, 1979 at 4.

However, in the *Report*, we characterized the Park Study as overstating the effect of cable television on local station audiences and we provided numerous reasons and examples demonstrating the validity of this characterization. Our analysis essentially has been ignored. Instead, the commenting parties have submitted a large number of criticisms of the Park study attempting to establish that it understates audience diversion due to cable. These criticisms address what we have shown in this *Report and Order* to be minor problems that do not significantly affect Park's results. Our belief remains that Park overestimates the effect of cable television on local television station audiences.

145. Additionally, several parties have attempted to obfuscate our criticisms and adjustments to the NAB-WEFA model. However, the issue here is clear and simple. WEFA's employment of a "logit" specification for its structural equations causes an inherent bias in their results because small independent stations must be predicted by the model to suffer greater percentage losses in audience from distant signals than larger stations, regardless of what the data actually may indicate. The responses to our criticisms of the NAB-WEFA model have acted to confirm, rather than contradict, this conclusion. We also have provided numerous reasons and examples demonstrating that the NAB-WEFA predictions of audiences losses to independent stations from cable television are overstated.

146. Finally, and most importantly, our detailed analysis of "grandfathered" markets and "worst case" broadcast stations has received criticism relating only to the procedure employed to determine audience diversion. However, not only did the commenting parties fail to show how our results would be changed with different methodology, but also we have found that these criticisms are invalid. (See discussion below.)

147. In summary, we believe our analysis demonstrates convincingly that 1) the data relied upon describe accurately the cable television and television broadcast industries; 2) the methodology employed is valid and has been applied properly; and 3) the conclusions are derived correctly from the available information.

148. *The Impact of Distant Signals on Public Service Programming by Local Stations.* The Commission has long been concerned about the effect the presence of cable television might have on the ability of local stations to fulfill their obligations to serve the public by providing local programming options to their viewers. Our concern has been that if cable succeeds in diverting viewers from watching the signals of local stations to those of distant ones, the resulting decline in revenues of the local stations might force these stations to reduce the public service programming that they provide.

149. Traditionally, we have attached particular importance to local public service programming because of the effect it may have in shaping the attitudes and values of citizens, in making the electorate

more informed and responsible, and in contributing to greater understanding and respect among different racial and ethnic groups. Since the social benefits of this programming exceed the private benefits of the actual viewers, we have sought to assure that the public will capture these benefits and, thus, for example, the Commission has recognized the necessity for licensees to "devote a reasonable percentage of their broadcast time to the presentation of news and programs deboted to the consideration and discussion of public issues of interest to the community served by the particular station." *Fairness Report*, 48 FCC 2d 1, 2 (1974) quoting *Report on Editorializing*, 13 FCC 1246, 1249 (1949).

150. In this proceeding, we are interested in determining what effect the carriage of distant signals has on the ability and propensity of local broadcast stations to provide local public service programming. To measure this effect precisely would require an elaborate set of information. Unfortunately, however, a fully descriptive or accurate set of the information necessary for this determination is unavailable. Most importantly, the expense data collected from television licensees by the Commission suffer from a lack of uniformity in accounting policies.[184] Thus, the reported results for station expenses and profits cannot be relied upon in a cross-sectional econometric analysis that is undertaken for policy purposes.[185]

151. Faced with these data limitations, studies have attempted to estimate statistically the relationship between station revenue and the amount of local programming broadcast by television stations. In our *Report*, we relied most heavily on a study performed by the Commission's Broadcast Bureau which utilizes the most recent data.[186] The Broadcast Bureau finds—after accounting for such factors as the presence or absence of network affiliation, whether a station is VHF or UHF, and the number of stations competing in the market—that each additional $1 million in station revenue is associated, on average, with about 14 minutes of additional local programming per week. This

[184] *See, e.g.*, R. E. Park, *et al.* "Projecting the Growth of Television Broadcasting: Implications for Spectrum Use," prepared for the Federal Communications Commission, 1976, p. 119. The authors suggest that the substantial differentials in the reported financial results for similarly situated stations, in addition to varying accounting methods, might also be attributable to different goals and performance by station management.

[185] The reference to cross-sectional analysis is mentioned here to signify that the problem exists most severely when comparing the results of different stations. It should be noted that we rely upon the reported operating income of television stations in our case study analysis. In this analysis, however, we are comparing the results of the same station over time. This approach minimizes variations attributable to a lack of uniformity in accounting policies or management performance.

[186] FCC Broadcast Bureau, "Television Public Service Programming and Audience Diversion: An Economic Analysis" in *Report on Information Developed under the Cable Economic Inquiry*, Docket 21284, April 18, 1979.

finding also is supported by the studies of Drs. Crandall and Park appearing in the literature.[187] It is important to note, however, that the Broadcast Bureau has taken care to emphasize that utilizing such a model to predict the effect of changes in revenue on the quantity of local programming may not produce very reliable estimates. Since the result is derived from comparisons across stations, it is not purely applicable to the effect of a change in an individual station's revenue. Accordingly, our use of the model has been limited to providing only a rough indication of the magnitude of the relationship between revenue and public service programming. Nevertheless, the results of the model suggest that changes in revenue have a small effect on the amount of public service programming that television stations broadcast.

152. To provide a rough estimate of the effect of cable television on the amount of public service programming broadcast by local stations, we applied the results of the Broadcast Bureau model to our findings in the "Grandfathered Market Analysis" of the *Report in Docket 21284*. The largest effect from cable television that we estimated for an individual station in the six grandfathered markets was a reduction in local programming of 5 minutes per week. Again, we must emphasize that this estimate should be considered only a rough approximation. Nevertheless, we believe our conclusion is correct that the effect of cable television on the amount of public service programming broadcast by television stations generally is minimal. This result is stringly supported by our other findings in the case study analysis that 1) the profits generally earned by television broadcasters enable them more than adequately to provide public service programming and 2) cable television plays a very small part in determining station profits.

153. Our analysis of the effect of cable television on the public service programming provided by local broadcast stations has not received substantial criticism. In fact, there virtually is no debate in the record concerning our finding of the effect of cable on the *amount* of public service programming by local stations. The only criticism of our finding is that the language in the *Notice of Proposed Rulemaking in Dockets 21284 and 20988* that "substantial increases in broadcast licensee revenues produced little increase in local and merit programming, and conversely, substantial decreases in licensee revenues produce little decrease in such programming"[188] is too strong in light of our statement in the *Report in Docket 21284* that the "results should be regarded as no more than rough approximations."[189] We do not believe, however, that these two statements are inconsistent. For

[187] *See* Rolla Edward Park, "Television Station Performance Revenues," *Educational Broadcasting Review*, June 1971; and Robert W. Crandall, "Regulation of Television Broadcast: How Costly is the Public Interest?", *Regulation*, Jan./Feb. 1978.

[188] *Supra*, at para. 60.

[189] *Supra*, at para. 138.

example, we would project that a $500,000 reduction in annual station revenue would reduce local programming 7 minutes per week. Thus a substantial decrease in station revenue would have a minimal effect on local programming. But more importantly, while we only can conclude the 7 minute estimate is a rough approximation, we can conclude with much more confidence that the effect is less than 15 minutes per week.[190] Thus, we believe our statement in the *Notice* that additional competition from cable television would not cause the supply of local and merit programming to diminish materially is valid.

154. The most serious criticisms of our analysis of the effect of cable television on the public service programming provided by local stations are the allegations of what it failed to consider. For example, NAB says it "cannot concur that the Commission should look only to local or 'merit' programming. The service a station provides encompasses a wide variety of program types."[191] Hence, NAB contends that "a station able to allocate more money to programming can purchase better programming as well as produce better programming."[192] Similarly, because program expenditures are correlated positively to revenues, NBC argues that revenues are correlated significantly to program quality and diversity. For the same reason, ABC apparently would like us to consider the findings of the Broadcast Bureau study that local programming expenditures are related strongly to station revenues. NAB synthesizes this line of reasoning by arguing that the "importation of additional distant signals will have a negative effect on the quantity and quality of broadcast service available to the entire viewing public."[193] Before proceeding, we note that neither the NAB, nor any other party, has offered any reason for rejecting our estimate of the effect of cable television on the *quantity* of local programming provided by television broadcast stations. Additionally, we believe that NAB's argument, along with those of the other commentators addressing the effect of cable television on the quality of television programming, demonstrates a misunderstanding of the economic theory and evidence adduced in this proceeding. For example, economic theory suggests that broadcasters may actually increase expenditures for programming in response to increased competition from cable television (because it may be more profitable to do so rather than to reduce expenditures). Thus there is no reason for us to expect that the

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[190] It should be noted that the effect of revenues on local program minutes is measured very precisely in a statistical sense by the Broadcast Bureau study to be 14 minutes per week for each additional million dollars in revenues. The F statistic (a measure of variance) for the coefficient of revenue is 32.96. The standard error is about 2 minutes per week. Thus, for the example above, we can attach a 99 percent level of confidence to the statement that the effect would be no larger than 15 minutes per week, assuming the model is specified properly.

[191] *Supra*, n. 93, at 121.

[192] *Id.*

[193] *Id.* at 118.

quality of television programming will decline necessarily because of additional competition. In fact, when the evidence is interpreted correctly,[194] the opposite result appears to be true in some circumstances. For example, the empirical estimates of the Broadcast Bureau study provide some evidence that the entry of an independent station into a market will cause an increase in program expenditures for the network affiliates.[195] Therefore, we find the industry's contention that additional distant signals will necessarily reduce the quality of local programming to be without merit. In any event, no evidence has been presented or uncovered in this proceeding that shows that cable television reduces or will reduce the quality of television programming broadcast by local television stations.

155. Finally, ABC has cited the Broadcast Bureau study for saying that the use of minutes of local programming may suffer from the fact that this data represents minutes of both remunerative and non-remunerative programming. However, this data limitation is of no consequence to our results because we conclude that cable television has no material adverse effect on the total amount of local programming broadcast by local stations. If cable forces a shift from non-remunerative local programming to remunerative local programming, we do not envision this effect redounding to the detriment of consumers.

156. In summary, we find that cable television does not affect materially the quantity of local programming broadcast by local television stations. Additionally, we find any claims of adverse impact from cable on the quality of television programming to be unsupported both by economic theory and by socioeconomic evidence.

Case Studies

157. In many respects the most important findings from our *Economic Inquiry* came from our case studies of actual markets facing cable competition. Our *Report in Docket 21284* focused upon cases for

[194] The evidence presented by NAB demonstrating that the revenue and expenses of broadcast stations are positively correlated by market size cannot be employed to derive any conclusions concerning the effect of additional competition on the magnitude or direction of the values of these variables. The suggestion that revenues and expenditures both will necessarily decrease in response to additional competition ignores the simultaneous interrelationship between audience, revenue, and program expenditures in determining the profit maximizing selection of programming. Revenues and program expenditures actually may increase in response to additional competition due to a new program selection mix. Additionally, NAB ignores the fact that broadcasters operating in smaller markets pay less for the *same* programs that are purchased in the larger markets. Hence, comparison of program expenditures across markets is not necessarily a good method for comparing program quality.

[195] It should be noted, however, that we cannot place much reliance on this estimate because of the inadequacy of the data. Nevertheless, this finding is supported both theoretically and empirically by the analysis of Park, *et al.*, *supra*, n. 184 at Appendix F.

which it was perceived that cable television would have the greatest potential to affect the viability of broadcast stations: (1) grandfathered markets which are characterized by high cable penetration and a large number of distant signals; (2) independent television stations in markets with significant cable penetration and where cable systems carry a large number of distant signals and (3) "worst case" stations or markets which have alleged they are harmed by cable television.[196] Comments were filed with the Commission on behalf of 78 broadcast stations and markets—including many independent stations, UHF stations, one-station markets and two-station markets. We considered these to represent the "worst" cases since they were the stations/markets which the industry chose to call to our attention. These case study analyses formed the backbone of our finding of the effect of distant signals on the performance of local broadcasters because most of the stations analyzed were operating in an essentially unregulated marketplace. We found no evidence of debilitating economic competition due to cable television. It was our intent to supplement the more theoretical findings of earlier scholarly studies and our own econometric work with actual evidence from case studies.

158. Six broadcast markets were selected for detailed analysis based upon their high levels of cable penetration and the availability of a large number of distant signals due to the grandfathering provisions of our rules.[197] These markets provide an excellent indication of the effect of cable television on local station audiences and finances in the absence of distant signal restrictions on cable television. The markets ranged in size from the eighteenth largest (Seattle, Washington) to one of the nation's smallest (Parkersburg, West Virginia - market 199). With the high levels of cable penetration present and the large number of distant signals being imported into these markets, we expected to find some evidence of audience diversion. Our primary concern, however, was the degree of audience loss and the extent to which this loss affected the economic viability of the local stations.

159. Of the six markets analyzed, only the Palm Springs and Bakersfield stations experienced appreciable audience diversion. Cable had no major effect on the audience levels in the other four markets. San Diego experienced a very slight diversion of audience; Parkersburg realized an audience gain; and Harrisonburg/York and Seattle experienced little, if any, audience effect from cable (the impact

[196] *Report in Docket 21284, supra*, at Section IV and Appendix B.

[197] Non-commercial stations were excluded from the analysis because the financial results of their operations are not reported to the Commission. Instead we performed a separate analysis of the effect of cable on non-commercial stations in Appendix C of the *Report in Docket 21284*. Comments on that analysis are examined in Appendix C of this *Report and Order*. We conclude in that study that cable television is no more likely to impact adversely on non-commercial television service to the public than it is on commercial service.

revealed was either a modest gain or loss depending upon whether a "rating based" or "share based" analysis was used.)[198] Although Palm Springs and Bakersfield experienced diversion from cable, their overall audience levels (9 AM - midnight) did not decline during the past five years.[199] More importantly, in all of the grandfathered markets, the revenue and operating income of the local stations had increased substantially from 1972 to 1977. Ordinary growth in revenues more than offset any adverse effects from cable. Thus, whatever adverse effect that cable may have had on stations in these markets, it was not large enough to offset the effects of other factors contirbuting to their well-being. We stated that we expected these trends to continue.

160. Because of the concern that independent television stations, as opposed to network affiliates, might be affected most by the carriage of distant signals on cable, we analyzed the effect of cable on the audiences and financial operating results of seven independent stations in five markets. These stations were selected by identifying all independent stations located in markets having 15 percent or greater cable penetration and a large number of distant signals on cable. For several reasons, these selection criteria yielded only a small sample suitable for analysis. For example, significant cable penetration must exist in a market in order to examine the effect of cable on individual local station audiences. Yet, all but two of the independent stations in the nation operate in the top 100 markets and nearly 75 percent of these stations are in the top 25 markets. Cable penetration in these large markets is generally very low. Another factor which narrowed the sample is that the cable systems within a market must carry relatively consistent distant signal complements in order for the analysis to be instructive. Also, a large number of distant signals must be imported by the cable systems to indicate the effect of cable in an unregulated market. Finally, the choice of markets was constrained by the data limitation that separate audience figures for cable homes are not always provided for many of the market counties where cable

[198] For a further discussion of this distinction, see paras. 123 and 124 of the *Report in Docket 21284*.

[199] This point deserves further clarification. Loss of audience is often discussed in two different contexts. When a lower percentage of cable homes vis-a-vis non-cable homes are viewing local stations, this appropriately is considered audience diversion in the sense that the local station's total audience is less than it would otherwise be if cable were not present in the market. However, it does not necessarily follow that the station experiences an actual decline in its audience when this diversion occurs. In fact, our studies found that station audiences normally increased over the period analyzed. Thus, it is apparent that factors other than cable (e.g. population growth, programming adjustment, increased power, and improved television receivers) often act to offset the effect of cable. Conversely, there are other cases in which a station's audience was shown to be stagnant or declining, and yet cable diversion of potential audience was either not present or was not a primary factor in the decline.

exists. With these selection criteria, only seven independent stations were found to be suitable for analysis[200] - primarily due to the fact that most independent stations are located in large markets with very low cable penetration.

161. Of the four independent VHF stations analyzed, two revealed a negative audience impact from cable and two experienced a positive effect. Of the three UHF independent stations analyzed, all revealed positive audience effects from cable, despite the carriage of at least five distant signals on cable systems in their markets. The two VHF independent stations which experienced a negative audience effect from cable were XETV, San Diego and KTVU, Oakland. Station XETV operates from Mexico and thus financial information for this station is not available to the Commission. The other station, KTVU, had substantial revenue and operating income gains over the past five years despite the presence and growth of cable. Furthermore, we found that independent VHF stations generally are very profitable. For example, the three VHF stations in our analysis, for which we had financial data, had a combined net income in 1977 of over $15 million. Thus, our study of independent stations revealed that cable is not a major negative force on the financial viability of these stations and that independent UHF cable versus non-cable viewing patterns within each county of the ADI market. Through a weighting of the audience diversion (or gain) due to cable on a county by county basis, we were able to develop a quantitative estimate of the marketwide audience effect on cable on the stations are often helped by cable despite cable carriage of many distant signals. Although some VHF stations experienced audience diversion due to cable in these essentially unregulated markets, the substantial amounts and growth of revenue and operating income of these VHF independent stations reveals a minimal impact of cable on their overall profitability. The results of this analysis were considered indicative of the potential effect of cable on independent stations in general. For example, because all but two of the independent VHF stations in the nation operate in the top 50 markets, one would expect these stations to be financially sound. In fact, further analysis revealed this to be true. We concluded that the revenues and operating incomes of independent stations will continue to increase due to both population growth in metropolitan areas and increases in the demand for television viewer exposures.

162. We also analyzed the audience trends and operating results of 78 broadcast stations and markets which, in the *Economic Inquiry*, alleged current and/or potential adverse impact from cable television.[201] Of these, only nineteen "worst cases" were identified as warranting further, more detailed, analysis to determine the effect of

[200] *See* Table 3 and Appendix B of the *Report in Docket 21284*.
[201] *See* Table 5 and Appendix B of *Report in Docket 21284*.

cable television upon station viability. Four selection criteria were employed to identify these cases. The primary criterion was to select for further analysis all stations or markets which experienced losses or no gain in audience during the past five year period and stations which had experienced a decline in "real" revenues (price deflated based upon the 41 percent inflation rate during the 1972 - 1977 period).[202] These two criteria yielded a total of sixteen cases (fourteen stations and two markets) for further analysis. Two additional stations were included because of high cable penetration in their markets and because of their previous involvement with the Commission in the form of requests for special relief. Finally, a station was included because of its claim of hardship despite relatively low cable penetration in its market.

163. The effect of cable television for these nineteen "worst cases" was estimated using the same procedure employed for the grandfathered market cases. The analysis included a thorough survey of local stations. The results were presented in Table 6 of the *Report* and are summarized below.

164. In four of the nineteen cases analyzed in detail, cable television acted to increase the overall viewing of local stations. There also were two cases in which cable appeared to have no effect on the audience of the local station.[203] In the remaining thirteen cases in which audience diversion from cable was present, only two instances were found in which the losses were accompanied by a decline in both "real" revenues and operating income. In each of these cases, however, the rate of growth of the stations' actual revenues was only slightly less than the rate of inflation. Moreover it is important to note that cable penetration and the number of distant signals carried by the cable systems in these markets remained relatively constant during the period, indicating some factor(s) other than cable was responsible for the decline in operating income. For example, one of these stations operates in the Idaho Falls market wherein a new network affiliate began broadcast operations in 1974. This is likely to be a very significant factor in explaining the audience and operating income decline of station KID-TV between 1973 and 1977. Therefore, we found that even in the worst cases, cable does not appear to be a major negative force on the financial situation of TV broadcasters. For example, although station KOSA, Odessa, Texas experienced an audience diversion of between 7 percent to 10 percent, this diversion of cable subscribers did not result in a decline in the station's average total audience. During the 1972 - 1977 period, cable penetration in the market increased ffrom 36 percent to 50 percent; the station's 9 AM to midnight audience remained constant; yet station revenues and

[202] No stations or markets experienced a decline in actual revenues.

[203] This is based upon the expectation that the true audience effect of cable probably lies somewhere between the impact based upon a "share" analysis and a "rating" analysis as discussed in paras. 122 and 124 of the *Report*.

operating income both increased by approximately 85 percent. We concluded that factors such as population growth and increased demand for television advertising make this apparent anomaly possible, and we stated that we expect these trends to continue in the foreseeable future.

165. Careful attention was given to the performance of each of the stations in our analyses. For example, a five year comparison (1972 - 1977) of all the relevant economic data for these stations was performed. We compared changes in cable penetration, average 9AM - midnight audience, revenues, and operating income for each station or market between 1972 and 1977. Actual audience measures of cable and non-cable viewing patterns were utilized to determine the diversion of local audiences due to the availability of cable television in the market. Additionally, we performed a detailed financial analysis of the stations/markets, including analysis of many other factors which influence performance, e.g. year operations began, local competition, and authorized power and antenna height. Finally, we carefully monitored the number of local program minutes broadcast by stations in the grandfathered markets.

166. In summary, we found in our studies of grandfathered markets, independent stations and "worst case" stations that cable television generally does not cause any appreciable diversion of local station audiences and that UHF stations, particularly those in intermixed markets, often are helped by cable television. More importantly, we found that overall audiences, "real" revenues, (i.e. revenues adjusted for inflation), and real operating incomes of local broadcast stations increased in most cases, despite the presence of cable. Our conclusion was that cable does not appear to be a major negative force on the financial situations of television broadcasters, and that the adverse effect of cable, if any, is not great enough to offset the ordinary secular growth in real incomes that the broadcast stations realize. The risk that consumers of broadcast television will be harmed by unrestricted cable carriage of broadcast signals was considered to be negligible and the existing levels of service to the public seemed secure. These case studies provided an excellent test of the effect of increased signal carriage, and they show conclusively that expanded viewing options on cable television do not work to the detriment of any group of viewers.

167. Because these studies spoke directly to the financial performance and market facts of individual stations or markets, we would have expected any errors in our analysis to be reported to us. None of the commenting parties, however, disputed the major findings of these studies—that even in the essentially unregulated markets, stations prospered. Moreover, if there were specific case studies missing that told a different story we would have expected these to be reported to us. None were. Rather, the cross-examination of this analysis fell generally into three categories: 1) apparent data inconsistencies or

criticisms of methodology including the discovery of some typographical errors, 2) questions as to why certain markets or stations were chosen for analysis, and 3) perceptions that certain types of stations and markets (UHF stations, independent stations, and smaller markets) were either ignored or insufficiently addressed. Several parties questioned the use of 1976 figures for marketwide "cable TV homes" in Appendix B of the *Report* whereas 1977 figures were cited in Table 2 of the body of the *Report*. This, they stated, indicated a lack of precision in the analysis. However, as was noted in Table 2–1 of the *Report*, the impact formula used in Appendix B consists of several factors which are, of necessity, obtained from different Arbitron source books. For the formula to be useful, each factor has to be taken from the same time period or from as close a period as possible. The most current figures available for the county rating and share factors in the formula were averages from three surveys taken in May 1976, November 1976 and February 1977. The survey of "cable TV homes" which fell closest to this time period range was taken in October of 1976 and, thus, this was the figure which had to be used in the impact formula in Appendix B of the *Report*, even though more recent data (September 1977) were available for the number of cable TV homes in each market. In other sections of the *Report* (Table 2) we used the more recent 1977 data to display cable growth since 1972. In short, we explained the distinction in the *Report* and, in any event, it makes no significant difference in the estimated impact whether 1976 or 1977 figures are used.

168. INTV also states that the impact formula should have used ADI (area of dominant influence) audience figures in both the numerator and denominator of the formula. We have, they feel, underestimated the impact by using the loss of cable homes in the ADI in the numerator while using the station's total audience in the TSA (total survey area) as the denominator. However, Arbitron's standard measure of a station's audience is provided on the basis of TSA surveys, and it is this total audience of the station on which the Commission seeks to measure impact. To measure impact only on the ADI portion of a station's overall audience (although this portion may represent 95 percent of the total audience) would slightly overstate the estimated impact. Ideally, to measure the impact of cable television within a station's entire survey area, one would determine the diversion or gain due to cable in each county of the station's survey area. However, due to the often large number of counties within a station's TSA, overlapping TSA counties among stations, and a lack of cable viewing data for each county within a station's TSA, this would be a formidable, if not impossible, task. The closest we can come to this ideal is to measure the diversion or gain within the Area of Dominant Influence (ADI) counties as a percentage of the station's total audience. It should be noted, however, that were we able to conduct the analysis for the entire TSA, the audience diversion would likely be

lower than that estimated in the *Report*, since cable normally improves the reception of a station's signal outside of its ADI.

169. INTV also criticizes the *Report* for failing to control for equality of reception in cable and non-cable homes by measuring overall impact throughout the market. That is, in distant counties of the ADI, cable may improve an ADI station's reception (and thus its viewing share in cable homes vis-vis non-cable homes); whereas in the closer ADI counties more diversion due to cable will occur. INTV feels that if the diversion in the closest counties were measured alone, the impact estimates would more accurately reflect potential harm. We are of the opposite opinion. It is the overall impact on a station which is important. One of the conclusions of the *Report* was that the improved reception characteristics of cable in some areas of a market can act to offset the negative effect of cable in other areas of the market. Even when a county may lie many miles distant from a station, if it is assigned to that station's ADI market (due to the viewing patterns of county residents) then the county is considered part of that market for TV advertising purposes.

170. NAB questions our use of a "sign-on to sign-off" audience figure to represent a station's total audience in the impact formula of Appendix B of the *Report*, whereas 9 AM to Midnight audience figures are used in other tables of the *Report*. As mentioned previously, all factors in the formula should be for the same period in order to be most useful. The share and rating figures in the Arbitron County Coverage books are provided in terms of the sign-on to sign-off period. Therefore, the average audience figure in the denominator of the formula also had to be expressed in these terms. In other sections of the *Report* we simply listed the more-often quoted measure of a station's average total audience—the average 9 AM to Midnight audience. Actually, it would not have made much difference whether the station's 9 AM to midnight audience or its sign on to sign off audience was used in the impact formula since there is normally little difference between the two figures. Both are used as generally representative of a station's average all-day audience. Only minor differences would have resulted by using a 9 AM to Midnight audience figure in the denominator of the formula—and the effect would have been to estimate a lower impact from cable than we predicted in the *Report*.

171. NAB also states that there are mathematical errors in the case studies which significantly affect the results. However, only one was specifically identified by NAB and, when corrected, we find an increase in the predicted cable impact by less than three-tenths of 1 percent. This error is insignificant, and on further review, we are unable to identify any mathematical errors which had any substantive effect on the results of our studies.

172. Another point raised by NAB and INTV is that the *Report* measures average audience diversion over the entire broadcast day

rather than during segments of the day when impact may be more severe—such as early fringe. We recognize that there are certain day parts during which audience diversion will be more than average. Nevertheless, for purposes of this analysis, the full day estimates provide an adequate and reasonable basis for judging the effect of cable on a station's overall audience and financial viability. The econometric analysis which attempts to provide quantitative projections of the effect of changes in signal importation deals with this issue in greater detail. See Section II.

173. INTV also seeks information as to why the six markets in the "grandfathered market" section of the *Report* were chosen for analysis. It states that there are other markets which meet our criteria of high cable penetration and a large number of imported signals; in particular the San Francisco market. We did not feel there was a need to examine every highly cabled and grandfathered market in the nation.[204] Rather, we selected a sample of six such markets which, it was felt, would provide a good cross-section for determining the impact of cable in various type markets. For example, several large markets with network and independent stations were chosen, one smaller market having all three network affiliates was selected and two of the smallest markets in the nation were chosen, each having extremely high levels of cable penetration, one being a one-station market and the other a two-station market. There was no intention to exclude any particular market from consideration. Indeed, we specifically encouraged, in the economic inquiry, all parties to submit instances and evidence of cable television's impact. In regard to not choosing the San Francisco market for analysis, we had already selected three of our six cases from the top 50 markets, and three of the six cases also were markets within the state of California. Therefore, we did not feel that including the San Francisco market would add materially to our results. It should be noted, however, that in the study of independent stations, three San Francisco stations were analyzed, two of which realized audience gains from cable in the market and all of which had experienced substantial revenue and operating income increases over the past five years. Furthermore, San Francisco market stations have, since 1973, had a 20 percent overall increase in average audience, increases in revenues of nearly 100 percent (from $62 million to $123 million) and increases in operating income of 140 percent (from $19 million to $46 million). During this period, cable homes have grown from 20 percent of the market to 30 percent of the market. These facts regarding the San Francisco market serve to strengthen our original conclusion that cable does not appear

[204] Also, the cable systems within each market had to carry the same number and complement of imported signals for the analysis to be instructive. This lowered the number of markets to choose from.

to have a significant impact upon broadcast station viability - even in highly cabled and grandfathered markets.

174. The Rocky Mountain Broadcasters' Association commented that the significance of two studies submitted in Docket 21284 had not been properly weighed by the Commission. One of the studies presented was by Dr. William Duhamel, President and General Manager of Duhamel Broadcasting Enterprises. The study described a methodology for computing cable audience diversion for eleven markets in the Rocky Mountain Time Zone. The methodology used is in many ways quite similar to that later used by the Commission in its *Report in Docket 21284* and, not surprisingly, yields similar impact results. Each of the eleven markets in the Duhamel study was examined in the case study section of the Commission's *Report*. The two markets which had not experienced audience gains during the past five years (all had experienced healthy revenue gains) were further analyzed to determine audience diversion due to cable television. In Cheyenne, Wyoming, the sign-on to sign-off audience diversion was estimated to be 14.5 percent and in Miles City/Glendive, Montana the diversion was estimated to be 26.1 percent. The Duhamel study produced very similar diversion estimates for these two markets. The slight difference in the two sets of estimates may result from the fact that Dr. Duhamel's analysis measures cable audience diversion as a percentage of a station's ADI audience and thus results in a somewhat higher estimate than the Commission's analysis which measures cable audience diversion as a percentage of a station's total audience from the TSA as measured by Arbitron. In short, there is no major disagreement with the Duhamel analysis, but rather with the conclusions reached. Our conclusion remains that we find no evidence that the audience diversion in these markets has resulted in a serious impact upon the revenues and financial viability of local stations and upon their ability to provide news and public interest programming. Of the eleven markets surveyed, all but two showed audience increases since 1972; all revealed increased revenues, and all had a positive operating income. The impact of cable in these highly cabled markets with many grandfathered systems has not resulted in any apparent decline in local broadcast service to non-cable households. It should be noted that the comparatively large audience impact figures which are revealed in the Rocky Mountain area should not be confused with estimates of audience impact which might result from the rule changes ordered herein. The Rocky Mountain estimates are for impact which has already occurred and been absorbed. More importantly, the magnitude of the impact is primarily the result of households in one or two station markets being offered (on cable) what the Commission has already authorized and encouraged as a minimum - access to three network stations and an independent station. Thus, any diversionary effect from additional signals would be spread among all stations being

offered on the cable systems and the incremental impact upon a local network affiliate would be minimal.

175. The other study submitted by the Rocky Mountain Broadcasters Association was prepared by Mr. Joseph Sample, a past president of the Association. Mr. Sample argues that, rather than an audience loss formula, a more appropriate measure of cable television's impact in a television market is revealed by a study of gross rating points (GRP's) - as determined by advertising agencies through the use of A. C. Neilsen audience surveys. For example, an agency seeking an advertising weight of 100 gross rating points (an audience measure) in each market within the Rocky Mountain Area would first purchase time in the major markets - Denver and Salt Lake City. Then, by utilizing the Neilsen studies which reveal audience spill-in and spill-out effects among markets, the advertiser can see that some GRP's in the smaller Rocky Mountain markets will be obtained. By not having to purchase a full 100 GRP's in these smaller markets, advertisers might negotiate lower prices or even drop a market from consideration - depending upon its coverage by larger markets. Mr. Sample's description of the methods used for purchasing station time in the Rocky Mountain Time Zone may well be accurate. However, either there are other advertisers who fill the void or some other means must be used by stations to offset the effect; because we can find no evidence to suggest any decline in the revenues or operating incomes of these smaller market stations.

176. Finally, there were several comments which expressed the opinion that certain types of stations and markets (UHF stations, independent stations, one-station markets and two-station markets) would be most affected by the proposed rulemaking, and that this had been either ignored or insufficiently addressed in the *Report*. This is not the case. We focused considerable attention upon these types of stations.

177. In the *Economic Inquiry Report* we analyzed 98 different stations and markets. Based on the comments received in response to our *Notice of Proposed Rule Making* we have now again studied and analyzed over 100 stations and markets and find our initial conclusion again confirmed. (See Appendix D) Eliminating the overlap in the stations and markets studied both in the *Economic Inquiry Report* and for this document, the total number of separate stations and markets analyzed is approximately one-hundred and sixty. The financial results of every station and market brought to our attention were surveyed. Our analyses included nearly every one and two-station market in the nation as well as a large number of UHF and independent stations. Five year trends of cable penetration, viewing audience, revenues and operating income were studied. Of all the "worst case" and grandfa-

thered markets and other stations analyzed in this proceeding, we were able to identify only one instance[205] in which an actual revenue decline had occurred over the past five years—in spite of both high cable penetration and the large number of distant signals available in many of the cases surveyed.[206]

178. Several parties in this proceeding commented that the impact of the proposed rule changes would fall most heavily upon UHF stations, which have traditionally been the least profitable segment of the broadcasting industry. Thus, it is stated, the proposals are in conflict with previous Commission decisions to foster UHF development.

179. This concern was given considerable attention in preparing the *Report in Docket 21284*, and we found no evidence to suggest that cable television would seriously affect UHF stations. Of the several studies[207] which separately consider cable television's impact upon both UHF and VHF broadcast stations, all reveal that UHF stations experience less audience diversion from cable television than do VHF stations. In fact, in many instances, it is found that cable television

[205] KVOS-TV, Bellingham, Washington experienced a revenue decline during the 1973–1978 period. However, this decline was primarily the result of the Canadian Tax Act of 1976 which stated, in part, that Canadian businesses could no longer write off as business expenses their advertising expenditures on American television. As KVOS-TV stated in an August 9, 1977 Letter to the Commission, "restrictive and discriminatory legislation in Canada has caused a critical erosion of our economic base. It has been necessary for us to cut our advertising rates by about 50% in order to remain in a competitive selling posture." The trend of revenue decline was reversed in 1978 when KVOS-TV experienced a revenue and operating income gain over the previous year. The station continues to remain profitable and is an economically viable business entity in spite of the effects of cable television and the recent Canadian Tax Act.

[206] There is an instance in which the presence of cable television is alleged to have brought about the change of a commercial to a non-commercial station. KTVR-TV was a network satellite station operating in La Grande, Oregon. It was sold to the State of Oregon in 1976 and now operates as an educational station. The Northeastern corner of Oregon is a very sparsely populated area of the nation which has never been able to support its own commercial television station. When the satellite station was established in 1963, the area was heavily served by cable and also had five translator stations providing all three network signals from Spokane, Washington. The parent station of KTVR-TV (KTVB, Boise, Idaho) now operates a translator station in the La Grande area. We cannot conclude that there has been a detrimental effect on the public in this region following the assignment of KTVR-TV's license to the State of Oregon. Network signals from Spokane, Portland, or Boise are available via translator stations and in addition, a new educational station providing local/regional originations has begun operation in La Grande.

[207] Park, Rolla Edward, *Audience Diversion Due to Cable Television: A Statistical Analysis of New Data*, The Rand Corporation, R-2403-FCC, April 1979; *Audience Diversion Due to Cable Television: Data for Response to Industry Comments*, The Rand Corporation, N-1334/1 - FCC, November 1979; Roger G. Noll, Merton J. Peck, and John J. McGowen, *Economic Aspects of Television Regulation*, The Brookings Institution, Washington, D.C., 1973; National Cable Television Association, *Comments*, Docket 21284, March 15, 1978; Schink and Thanawala, *The Impact of Cable TV on Local Station Audience*, Wharton EFA, Inc., Philadelphia, Pa., March 1978.

generally has a positive effect on UHF station audiences. NCTA's study of mature independent UHF stations and our own study of UHF stations tend to confirm this effect. Of fifteen UHF stations analyzed by NCTA, the audiences of thirteen (87 percent) were augmented by cable television. In the *Report in Docket 21284* and in the response to comments received since the *Report*, the Commission examined the performance, over the past five years, of thirty-four UHF stations. Over 75 percent of these stations had audience increases during the period, and all experienced revenue increases. We further analyzed the cable versus non-cable viewing shares of thirteen UHF stations and found that cable augmented the viewing of ten (77 pe-cent) of these stations using a rating-based analysis and eight stations using a share-based analysis. These results are not surprising since cable television has the effect of equalizing UHF and VHF reception throughout the market thus eliminating the primary aspect of the "UHF handicap." The improved viewability of the UHF station in its market offsets in varying degrees the diversionary effect of distant signals.

180. With regard to cable television's impact upon future growth in the number of UHF stations, the aforementioned findings also would indicate that the impact would be minimal. New UHF stations have in fact continued to come on the air in areas of the country, such as for example in Pennsylvania, where there is already extensive cable penetration. Additionally, a Rand Corporation paper[208] prepared by R. E. Park and Barry Fishman, *The Viability of Television Stations: Comments and Extensions*, lends evidence to this conclusion. Their econometric model predicts that the number of commercial UHF stations in the top 100 markets will approximately double by 1990. The model also provides weak evidence that cable television generally has a positive effect on UHF stations, although in each case the overall result depends upon whether the positive effect of improved reception or the negative effect of competing signals predominates.

181. Another way of looking at the facts gathered in these studies of grandfathered markets, independent stations, and "worst cases" is to examine all the markets and stations in areas where cable penetration has increased over the last five years. Of the one hundred and thirty-one cases in which cable penetration increased, only twenty-one stations experienced any audience decline, and only one (KVOS-

[208] This paper estimates UHF station viability, and updates the authors' previous work: *Projecting the Growth of Television Broadcasting; Implications for Spectrum Use*, Rand Corp. R-1841-FCC, 1976, - a study used by the Federal Communications Commission's UHF Task Force in estimating future spectrum demand. *See also*, "An Evaluation of the Rand UHF Viable Stations Model," FCC, March 1979. A useful summary of the conclusions of this Rand study as they relate to cable television can be found in testimony of Dr. Leland L. Johnson to the Communications Subcommittee of the House of Representatives. *Cable Television Regulation Oversight: Hearings Before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. (1976) Serial No. 94-137 pp. 42-44.

TV, Bellingham, Washington - see note 205) had a decline in revenues and operating income. All others experienced gains in revenues and/or operating income, most of which were substantial. It is thus apparent that other factors (e.g. rate increases stimulated by the demand and supply of television advertising) almost always act to offset the effect of audience decline in those relatively few instances where it is shown to occur. This was one of the most revealing aspects of the case study analysis.

182. We noted in the *Report* that the revenues and profits of stations are likely to increase in the future and that the effects of cable competition are likely to be offset at least in part by increases in population and demand for television viewer exposures. Although some parties suggest that population will not increase, or that future revenues will not offset the effects of cable audience diversion, or that other factors will reduce revenue growth, we believe these case study analyses present a fairly clear picture of both the actual trend and the functioning of the market in the presence of high cable penetration. Population has increased during the period analyzed, station audiences have increased, and revenues and profits have grown markedly. With respect to population, we expect this trend to continue.[209] Moreover, it seems clear to us that advertiser demand is strongly correlated with overall economic activity and that it too will be increasing both because of increased populati and because of rising economic activity. The increased demand for viewer exposures over the long term will translate into higher advertising rates and increased revenues.[210]

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[209] *See* Bureau of Census, Current Population Report; Series P-25, No. 704 (Projections of the population of the United States 1977–2050; 1977) Series II Projections. During the 1960's, the population in the United States grew by approximately 13 percent or 24 million persons. In the 1970's, the growth rate slowed to 9 percent (18 million persons). During the 1980's expectations are that the growth rate will remain at 9 percent (22 million persons). As can be seen (although the growth rate has remained stable), in absolute numbers, population will grow by more during the 1980's than it did during the 1970's. More importantly, the 26–36 year old population group (children of the 1954–1964 "baby boom") is expected to increase by nearly 20 percent during the 1980's. This is a primary buying group for the durable goods advertised on television such as furniture, automobiles and appliances. Additionally, TV households are expected to grow at a faster rate than population, due to an increase in the number of single-person households. We have used the mid-range Census Bureau projections here (Series II) because they appear to be the most reasonable (see Bureau of Census, Current Population Reports, *Id.* at n. 6). However, even using the lowest growth projection (Series III), as is done by some commenting parties, significant population growth will occur during the next decade.

[210] The comment is sometimes made that secular growth in television station revenues will not overcome the audience fractionalization effects of cable because expenses as well as revenues increase over time. See, for example, John A. Dimling, Jr., "A View from the National Association of Broadcasters," in *The Role of Analysis in Regulatory Decisionmaking*, Park, Ed., Lexington Books, 1973 at 25. The short answer to this is that revenues do rise faster than expenses. The compound annual growth rate of total broadcast revenues from 1973 to 1798 was 14.8 percent and that

183. These conclusions appear to be widely shared not only by industry analysts and advertising agencies, but also by broadcast industry executives as reflected in their public statements. Individuals in each of these areas have recently stated that decreased audience shares will not translate into declining revenues. For example, the President of NBC has been quoted as stating that commercial television's share of the viewing audience through 1988 will remain high—close to 90 percent—and that the impact of alternative program sources would not decrease audiences, but rather would increase the number of hours each household spent watching television. He further predicted (citing an NBC study) that the growth in TV homes and multi-set homes would compensate for other forms of audience diversion and that television would receive an increasing share of advertising expenditures.[211] The Vice-President and Chief Economist of CBS television has said that moderate changes in television audience shares will not change revenues until advertisers have an alternative and they will not have such an alternative during the coming decade.[212] The President of the Television Bureau of Advertising has predicted that television advertising revenues will surpass newspaper advertising revenues by the end of the decade.[213] The U.S. Department of Commerce has recently predicted that broadcasting will receive an increased share of advertising expenditures despite the increased rates charged. Advertising expenditures for radio and television are predicted to expand at a compounded annual growth rate of 14 percent for the next five years.[214]

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of expenses 13.4 percent (net income rose at a 20.3 percent compound annual rate). No reason why this trend should not continue is evident.

[211] "Television and the New Technologies," remarks by Fred Silverman to the California Broadcaster's Association, August 24, 1979.

[212] Presentation by Dr. David Blank to the Broadcast Financial Management Association's 19th Annual Conference. *Broadcasting*, September 24, 1979, p. 32. This statement attributed to Dr. Blank parallels a comment filed with the Commission by CBS some fifteen years ago which experience shows to have been quite accurate. As CBS stated: ". . . continuously offsetting the effects of the rise in CATV penetration, with its depressing effect on station revenues, is the persistent rise in advertising demand for television time." "In other words, it will be only in rare cases that the rise of CATV will, in fact, be rapid enough and large enough in magnitude to cause an absolute decline in station revenues. And this is precisely why it is so hard to find actual cases of stations in which CATV growth can be related to absolute declines in station revenues." Comments of Columbia Broadcasting System, Inc., in Docket 15971, July 23, 1965 at 27, 29.

[213] *Broadcasting*, May 5, 1979, p. 114.

[214] *U.S. Industrial Outlook 1980*, U.S. Department of Commerce, Industry and Trade Administration. See also, for example, "Walking on the Sunny Side of Wall Street" (an interview with Mr. Bill Suter of Merrill, Lynch, Pierce, Fenner and Smith), *Broadcasting*, January 28, 1980, p. 72; "Forecasters See a Mixed Outlook for Broadcasting in the Eighties," *Broadcasting*, September 24, 1979, p. 32; Remarks by Gene Jankowski, President of CBS/Broadcasting Group, before the Academy of Television Arts and Sciences, November 29, 1979; "Financial Impact of New Technologies: End of Golden Age?-' *Television/Radio Age*, January 14, 1980, p. 66;

184. In conclusion, it should be emphasized that the approximately 160 markets and stations analyzed in Docket 21284 were not randomly selected. Rather, most were brought to our attention as representing the worst instances of cable impact. They included most one and two station markets, many markets with high levels of cable penetration and a larger complement of imported signals (due to "grandfathering") than otherwise authorized, and a great many UHF and independent stations. Following the additional analyses conducted in response to the comments in Docket 21284, our basic conclusions as stated in the *Report* and in *The Notice of Proposed Rulemaking* have not changed. We feel that it is unlikely that any broadcast station will be significantly harmed by a relaxation of our carriage rules and extremely unlikely that any viewer will be significantly harmed. By contrast, the benefits of a relaxation of our distant signal restrictions are obvious: an increase in the opportunity for diversity and competition both in the economic marketplace and in the marketplace of ideas. We believe that existing levels of service to the public are secure.

Conclusions

185. Traditionally, we have been concerned that cable television, by threatening the viability of local stations, could cause a significant reduction in television broadcast service—especially for the poor and rural consumers who would not be able to purchase cable service. We were also concerned that cable television might cause a reduction in the external benefits flowing to our entire society because we felt that the additional competition from cable television could result in a decrease in the supply of local public service programming broadcast by television stations. Thus, we have acted cautiously in promulgating our cable television policies in the face of considerable uncertainty concerning the effect of cable television on local television broadcast service.

186. The information adduced in this proceeding, however, has allayed the fears we have harbored concerning the risk of loss of service to non-cable households. That risk has been found to be very small. After almost three years of intensive study, we have not found it to be the case that competition from cable television has redounded to the detriment of non-cable households. This finding is not attributable to our turning a deaf ear to the most egregious csaes. To the contrary, we have analyzed approximately 160 cases, many of which have been brought to our attention as instances where the local stations suffer harm due to cable television. In the cases that we have identified as having audience declines during the 1972–1977 period, or revenue increases less than the rate of inflation, we performed further detailed analysis to determine the extent to which cable television

"We'll Do Quite Well, Thank You," Rosenfield, *Broadcasting*, November 19, 1979, p. 68; "TV Ad Picture Bright," *Washington Star*, April 2, 1980, p. F-1; "Double Digit Optimism For Broadcasting Economy," *Broadcasting*, January 1, 1979, p. 40.

appears to be a negative force on their financial situations and, more importantly, whether cable television threatens the local television broadcast service to non-cable households. We found that cable television is not a major negative force on the financial situation of these stations and poses little or no threat to their continued operation.

187. We also analyzed carefully six "grandfathered" markets and seven independent stations that face substantial competition from cable television because of high marketwide cable penetration and a large number of distant signals. These cases are representative of a marketplace functioning essentially without any signal carriage restrictions. We have found that competition from cable television does not appear to threaten the continued operation of the local stations in any of the cases analyzed.

188. We also inquired into the effect of cable television on the public service programming provided by local broadcast stations. Here, we were able to establish only a very weak relationship between the two. In the cases where we thought competition from cable television was most severe, we estimated only a very small reduction in the amount of local programming provided by the broadcast stations. Furthermore, we were unable to establish theoretically or empirically that cable television reduces the quality of local programming. Competition from distant signals may actually, in some circumstances, increase the quality of programming broadcast by local stations.

189. Intuitively, the above findings may seem somewhat surprising. Certainly, the evidence demonstrates that local broadcast stations will earn less revenues and profits if distant signals are authorized than they otherwise would have if additional distant signals were not permitted to be imported. However, television broadcast stations, including UHF independent stations which traditionally have been presented to us as the industry's weakest element, often earn substantially more than a normal return on their investments. Additionally, UHF stations in intermixed markets, which traditionally have been our greatest concern, often are helped by cable television. But, perhaps more importantly, the impact of additional distant signals on local stations will occur in a context of offsetting factors. Increases in population and the demand for advertising act to increase substantially the revenues and profits of local broadcast stations. Moreover, even if cable penetration levels were much higher than they are today, the audience losses attributable to cable television are small in relation to the hearly growth in revenues and profits that we observe for television stations. Thus, we find that the risk of loss of service to non-cable households appears to be small. It seems unlikely that poor or rural consumers will be denied television service because of additional competition from cable television. The existing levels of local public service programming provided by broadcast stations also seem secure and actually are expected to increase because of the entry of new stations into the marketplace. Therefore, the costs to non-cable

households from deregulating cable television appear to be insignificant.

190. On the other hand, the benefits to existing and potential cable households from permitting the carriage of additional signals are substantial. Millions of households may be afforded not only increased viewing options, but also access to a diversity of services from cable television that presently is unavailable in their communities.

191. In summary, we believe that relaxation of our distant signal carriage restrictions will promote substantial improvements in television service to the public without causing any significant risk of loss of the existing levels of service provided by local television broadcasting stations. We have found in our analysis of the evidence in this proceeding that competition from cable television has improved television service to the public and will continue to do so in the future. More specifically, in terms of the criteria for evaluation of these rules set forth, we do not believe the elimination of the rules will have undesirable distribution or external effects and we believe their elimination will promote the welfare of consumers generally.

III. The Effect of the Syndicated Exclusivity Rules on Television Service to the Public.

192. Existing rules, in addition to establishing quotas on the number of distant signals that may be carried, require the deletion of particular syndicated programs from those signals that are carried, upon the request of local television stations and in some instances at the request of program producers or distributors.[215]

193. Because of their historical origin, the intended function of these rules is not as clear as it might otherwise be. This history is set forth in some detail in the *Syndicated Exclusivity Report*, (pp. 956–964) as well as more recently in *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979). Compressing a somewhat complex situation down to its fundamentals, this history reveals that in 1971 the Commission was prepared to adopt a set of cable television distant signal carriage rules that contained no limitations of the type now found in the exclusivity rules. As the result of a "Consensus Agreement" between major elements of the cable television, broadcast television, and television program production industries, which the Commission adopted in order to facilitate the passage of copyrighted legislation, the syndicated exclusivity provisions were included in the rules. Because of the process whereby they were adopted, there was virtually no economic analysis of their

[215] Generally speaking, for purposes of these rules, a syndicated program is any television broadcast program other than a network program, including series programs, feature films, and all other non-network programs. See 47 C.F.R. §76.5(p). The provisions of the syndicated exclusivity rules are more generally described in paragraphs 14–16 above.

functioning either by the Commission or, apparently, by the industry groups involved.[216] For this reason also there is no extended "legislative history" or other articulation of the rationale underlying the rules. In part, it appears that they were intended as a response to the fact that cable television systems operated outside of traditional program supply markets as a result of the operation of the Copyright Act of 1909,[217] creating what was viewed as unfair competition between cable television systems and television broadcast stations. In our *Syndicated Exclusivity Report* and in our *Notice of Proposed Rule Making* in this proceeding we concluded that this consideration was coextensive with the issue of copyright liability and not a reason for retaining the rules.[218] In particular, we noted the statement in *Home Box Office v. FCC*, to the effect that the Supreme Court's decision in *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1977) "certainly does not establish that 'unfair competition' requires the general protection of broadcast television,"[219] and the same Court's conclusion in *CBS Television Network Affiliates Ass'n v. FCC*, that our concern over "unfair competition" was essentially based on the possibility that distant signal importation by cable systems might threaten the viability of local stations from the standpoint of allowing "debilitating economic competition" and not "so much with the 'pirating' of signals per se."[220] Nothing in the comments received provides us with any reason to alter our conclusion in this regard.

194. A more explicit rationale for the rules was set forth in the 1972 *Cable Television Report and Order* where it was said that the rules were intended "to protect local broadcasters and insure the continued supply of television programming."[221] In view of this statement, when we commenced our review of these rules in our *Notice of Inquiry in Docket 20988*, we sought information on the following questions:

- If there were no cable television syndicated program exclusivity protection for television broadcast stations, how would this

[216] In view of this it is somewhat disconcerting to find parties arguing that the economic analysis which led to the adoption of the rules are as valid today as in 1972. See, for example, Motion Picture Association of America, comments in Docket 20988, March 1, 1977 at 7.

[217] 35 Stat. 1075, as amended.

[218] *Syndicated Exclusivity Report*, *supra*, at paras. 17, 35, 51-52, *Notice of Proposed Rule Making in Dockets 20988 and 21284*, *supra*, at para. 61.

[219] 567 F. 2d at 41.

[220] 555 F. 2d at 990.

[221] 36 FCC 2d at 169 (1972). More generally, it might be said that the rules were adopted to facilitate the passage of copyright legislation applicable to the cable television industry. This rationale has been the subject of litigation and, as a consequence of this litigation and the passage of copyright legislation in 1976, the commission is now obligated to consider the continuing validity of these rules pursuant to the Court's order in *Geller v. FCC*, *supra*.

affect their ability to serve the public in those areas they are licensed to serve?, and

– What effect do the syndicated exclusivity rules have on the production and availability of syndicated programming?

195. In our *Syndicated Exclusivity Report*, we responded in terms of these two concerns separately, noting, however, that the form of the rules suggests that they were principally intended as protections for program suppliers.[222] That this is so is suggested by the fact that the most extensive protections are accorded the larger market stations which presumably are less in need of protection from competition and from which program suppliers obtain the bulk of their revenues and by the provision of the rules that permits the substitution of additional (and conceivably more attractive) programs in place of those deleted.[223] That this view is correct is confirmed by some industry comments. In our *Notice of Inquiry in Docket 20988* we noted the statement of the National Association of Broadcasters that, "[i]n terms of ameliorating impact on local television stations the rules are largely meaningless."[224] Comments from ABC, state that "The important point is not fractionalization impact at all. Having decided upon the number of permissible distant independent signals, the Commission has established a permissible degree of fractionalization."[225]

196. However, because whatever impact there is on program supply from changes in these rules is derivative of the impact they have on television broadcast stations, we discussed each separately in the *Syndicated Exclusivity Report* and will do so here as well.

197. In our *Report in Docket 20988* we analyzed the effect of the syndicated exclusivity rules on television service to the public. We examined the effect of the rules on the subscribers and potential subscribers of cable television, on local television stations, and on the supply of television programming. We concluded that the public interest would be better served in the absence of the syndicated exclusivity rules for cable television systems.

198. Television broadcast and program production interests have voiced numerous objections to the findings of our *Report*. Many of the criticisms leveled at our analysis in the *Report in Docket 21284* are

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[222] *Supra*, at p. 976–977.

[223] In addition, some of the rights created by those rules flow directly to program suppliers.

[224] *Supra*, at p. 953.

[225] American Broadcasting Companies, Inc., comments in Docket 20988, March 1, 1977 at p. 34. See also, for example, comments of Westinghouse Broadcasting Co. in Dockets 20988 and 21284, September 17, 1979: "Nor was the primary intended purpose of the rules to prevent station audience fractionalization or diversion." (p. 7). Others have made the point more bluntly. Barbara Ringer, the Register of Copyrights wrote in 1972 that the rules were "probably the most elaborate and intricate copyright provisions ever promulgated anywhere." Barbara Ringer, "Recent Cable Television Developments in the United States Involving Copyright," 3 *Performing Arts Review* No. 4, p. 581 (1972).

repeated for the analysis in the *Report in Docket 20988*. These criticisms are addressed in Section II, *infra*, and that discussion is not duplicated here. Several other criticisms are directed to the analysis which appears only in the *Report in Docket 20988*. The discussion in this section should, we believe, demonstrate that these criticisms also are without merit. Moreover, no new evidence has been submitted which contradicts our previous findings.[226] Thus we remain confident that the public will be better served without the syndicated exclusivity rules.

199. At the outset we must emphasize that the syndicated exclusivity rules impose substantial welfare costs upon the subscribers and potential subscribers of cable television service. The television programs that are blacked-out pursuant to the syndicated exclusivity rules are readily available at cable head-ends and can be delivered to cable subscribers at no cost. The fact that cable subscribers are denied programs when the marginal cost of receiving them is zero violates a basic efficiency criterion of modern welfare economics.[227] The resulting welfare loss to cable subscribers is substantial. Our *Report in Docket 21284* found that the demand for and the availability of cable television service by and to consumers is affected significantly by distant signals. Thus the syndicated exclusivity rules impose substantial costs upon the subscrib ers and potential subscribers of cable systems by restricting many of the programming alternatives on distant signals for which consumers are willing to pay.[228]

200. Several parties disagree with our conclusion that the syndicated exclusivity rules impose costs on the subscribers and potential subscribers of cable television. For example, some parties argue that the elimination of the syndicated exclusivity rules will not foster diversity because only duplicative programming will be made available to cable subscribers. Several parties also criticize our reference to an

[226] Several comments from parties with both cable and broadcast interests, including Storer Broadcasting and the parties filing jointly with Cox Broadcasting, urge the elimination of the distant signal carriage rules but retention and simplification of the syndicated exclusivity rules. Storer Broadcasting, comments in Dockets 20988 and 21284, September 18, 1979; Cox Broadcasting Co. *et al.*, comments in Docket 20988 and 21284, September 17, 1979. No study or evidence is offered in support, however, Cox *et al.*, for example, finding it "unnecessary" and "presumptuous" to add further specific data.

[227] *See, e.g.*, Jora R. Minasian, "Television Pricing and the Theory of Public Goods," *Journal of Law and Economics*, Vol. 7 (October 1964). *See also* Noll, Peck, and McGowan, *Economic Aspects of Television Regulation* (1973).

[228] For estimates of the amount of programming on distant signals that can be blacked out pursuant to the syndicated exclusivity rules, see the *Report in Docket 20988*, at para. 59. It should be noted that we have been unable to estimate precisely the effect of the syndicated exclusivity rules on the growth of cable television. There are many factors which influence the decision whether to provide cable television service to an area. Nevertheless, the syndicated exclusivity rules reduce entrepreneurs' willingness to risk their capital to provide cable service because they reduce the expected returns from providing that service.

earlier proceeding before the Commission concerning television re-runs[229] where the television networks and other broadcasters presented evidence intended to demonstrate the value to the public of having alternative viewing times for the same program. NBC argues "in that proceeding, the issue was the value of repeat broadcasts for the entire viewing public not the 'very small percentage' of cable subscribers on systems presently required to comply with the rules."[230] NBC has not demonstrated, however, why repeat broadcasts are of less value to this segment of the viewing public nor why a "very small percentage" would create significant injury. Indeed, evidence suggests that consumers are willing to pay for such broadcasts.[231]

201. Fisher Broadcasting, Inc., by providing share data for the top ten primetime programs in the Seattle-Tacoma market, makes a more specific attack on our reference to the material filed in the re-run proceeding (Docket 20203). In that proceeding a number of individuals and organizations involved in the production of television programming were urging the Commission to restrict the amount of repeat or re-run programming shown on the major television networks. The networks and various television station parties were defending the re-run practice. By way of illustrating why the syndicated exclusivity rules decrease significantly the welfare of cable subscribers even though the programming lost under these rules will generally be available at some time from a local television station, we made reference, in footnote 83 of our *Syndicated Exclusivity Report*, to the contention of broadcasters in the re-run proceeding that "with respect to prime-time network programs only 14 percent of the potential viewing audience actually watches a program when it is first broadcast."

202. Although Fisher Broadcasting has attacked the 14 percent figure, when carefully considered, these comments actually appear to reinforce the point made: namely, that during a single broadcast of any particular program a considerable portion of the potential audience for that program is either watching another channel or not watching television at all, and would, for that reason, find alternative viewing times for programs to be highly desirable.[232] Fisher's com-

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[229] *Report and Order in Docket 20203*, 61 FCC 2d 946 (1976).

[230] *Supra*, at n. 48 at p. 21. It should be noted that by concurring in our derivation that only 4.4 percent of all households presently can be affected by the syndicated exclusivity rules, should broadcasters fully exercise their rights, NBC lends credence to our belief that the effect of eliminating the rules on local broadcasters and program producers will be small.

[231] *See* para. 93 and n. 32 in the *Report in Docket 20988*. It should be noted that in our *Syndicated Exclusivity Report* we did not dwell at length on the costs these rules impose because we found little reason to retain them in terms of their own justification and wished to avoid, insofar as possible, any suggestion that the rules should be eliminated to "promote" cable television. What we are concerned with is the overall service the public receives.

[232] The value of alternative viewing times to the public is illustrated by the home video

ments show that during January 1979 the ten most popular prime time programs in the Seattle-Tacoma market were viewed, on average, by about 32 percent of the potential audience.[233] Clearly, the average audience reached by all prime time network programs will be far below the figure for the ten most popular, the average audience for all network programs will be lower than the prime time average, and the typical syndicated program will, in any particular showing, reach even a smaller part of the whole potential audience. Thus, Fisher's comments tend to reinforce the point that a considerable portion of television households do not view a program when it is first broadcast. "Duplicative" programming can therefore offer many households true diversity. Thus, we believe that the syndicated exclusivity rules reduce both program diversity to some cable subscribers and "time diversity" to others.[234] We believe these reductions diminish significantly the welfare that subscribers and potential subscribers derive from cable television.

The Impact of Eliminating the Syndicated Exclusivity Rules on Local Stations.

203. As indicated, the syndicated exclusivity rules were adopted, in part, "to protect local broadcasters."[235] Our *Report in Docket 21284* analyzed the effect of distant signals, in the absence of blackouts resulting from the application of the syndicated exclusivity rules, on television service to the public.[236] We found that protection of local stations against competition from distant signals imported by cable systems served no public interest purpose. This finding largely moots any concern that the syndicated exclusivity rules are necessary to promote the public interest by protecting the operation of local stations because the effect of the syndicated exclusivity rules on local broadcast service is a subset of the larger, encompassing effect of unregulated distant signal carriage. Nevertheless, since the effect of

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recorder business in which consumers are making substantial investments for the principal purpose of making possible alternative television viewing times. See, for example, D. Agostino, R. Johnson, and H. Terry, "Home Video: a Report on the Status, Projected Development and Consumer Use of Videocassette Recorders and Videodisc Players," Feb. 1980: "It is clear that the principal use of the VCR to date is for time-shift viewing." p. 61. The loss of programming by virtue of these rules is a major source of complaints to the Commission from cable subscribers.

[233] *See* Fisher Broadcasting, Inc., comments in Dockets 20988 and 21284, September 17, 1979. *See also* the *Report and Order in Docket 20203*, 61 FCC 2d 946 at n. 5 of Appendix A (1976).

[234] *See also* 47 C.F.R. Part 76.151(a) which requires cable systems in the top fifty television markets to black-out for a period of one year, upon request from the copyright holder, first-run syndicated programming imported from distant markets, even if the programming is not broadcast in the local market.

[235] *Cable Television Report and Order*, 36 FCC 2d at 169 (1972).

[236] It should be noted that most of the studies of audience impact due to cable television in this proceeding measure the results of a marketplace functioning without syndicated exclusivity restrictions. *See* para. 56 of the *Report in Docket 20988*.

the syndicated exclusivity rules on program supply is derivative of the effect of the rules on local station audiences, we provided estimates of the amount of audience that is subject to shelter by the rules in order to gauge the effect of the rules on program supply.

204. To determine the effect of the syndicated exclusivity rules on local station audiences we would have liked to compare the distribution of cable viewing to distant signals for instances in which the rules were and were not in effect. By taking the difference between these two distributions we would have been able to determine directly the amount of audience that is protected by the rules. Unfortunately, the requisite data for such an exercise were unavailable. Even today it appears that syndicated exclusivity protection is not requested or provided on a wide-scale basis.

205. Our *Report*, however, established that the audience subject to shelter by the syndicated exclusivity rules is equal to a percentage of the total audience loss attributable to cable in the absence of exclusivity protection.[237] We assumed this percentage to be equal to the percentage of all distant programming that potentially could be blacked out pursuant to the rules. Thus, if cable television diverts 10 percent of the audience of a local television station in an unregulated market (i.e., there are no distant signal carriage or syndicated exclusivity restrictions) and 40 percent of the distant programming carried by the cable systems could be blacked out pursuant to the syndicated exclusivity rules, we assumed that 4 percent of the local station's audience could be protected by the syndicated exclusivity rules. Or, stated differently, the potential impact of eliminating the rules on the local station's audience in this case is estimated to be 4 percent.

206. We employed the study by Dr. R. E. Park of the Rand Corporation to estimate the percentage of time that distant signals on cable could be blacked out pursuant to the syndicated exclusivity rules under various local market conditions.[238] Park's work is the only published article on the subject of which we are aware and his estimates are broadly consistent with those provided by various parties in this proceeding.[239] We applied Park's "black out" percentages to his estimates of audience diversion due to cable in an unregulated market[240] to determine the protection which potentially could be afforded to local stations by the syndicated exclusivity rules. Park's

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[237] To simplify the analysis and be conservative in terms of audience impact we assumed that no program substitutions would be made.

[238] R. E. Park, "The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations," The Rand Corporation, June 1972.

[239] *See, e.g.*, the Comments of the National Cable Television Association in Docket 20988, March 1, 1979.

[240] R. E. Park, "Audience Diversion Due to Cable Television: A Statistical Analysis of New Data," the Rand Corporation, Prepared for the Federal Communications Commission, January 1979, attached as Appendix A to the *Report in Docket 21284*.

audience estimates were employed because the results are pesented in a form which facilitates ready application of the "black out" percentages appearing in his earlier study. We took care to emphasize, however, that we believed Park's estimates of audience diversion due to cable were overstated.

207. Approaching the issue of audience diversion from the elimination of the syndicated exclusivity rules conservatively, we explored the potential impact at both current cable penetration levels and anticipated future penetration levels. Under present conditions we found that the syndicated exclusivity rules, should broadcasters *fully* exercise their rights, would protect no more than one percent of the audience for any local station.[241] In the long-term we estimated that the maximum possible audience protection from the rules for some local stations may approach nine percent. We noted, however, that this estimate was overstated because of the use of the Park audience model. The estimates for the long term also were dependent on the assumption that the grandfathering provisions of our rules would no longer be applicable. Thus we concluded that the exclusivity rules would protect much less than nine percent of the potential audience for any broadcast station in the foreseeable future.

208. This conclusion was corroborated by our findings in the *Report in Docket 21284*. For example, in our grandfathered market analysis the largest audience loss due to cable for stations that would be able to exercise their rights to protection but for the grandfathering provisions of our rules was between 4 and 7 percent for the VHF independent station operating in San Francisco, California. The syndicated exclusivity rules could protect no more than between 2 and 4 percent of this station's potential audience if the grandfathering provisions were eliminated.[242] Similarly, if syndicated exclusivity protection were afforded to the stations in our grandfathered market analysis suffering the largest audience losses due to cable (i.e., those stations licensed to Palm Springs, California which are not entitled to protection because they operate outside the top hundred markets), the audience protected for these stations would be no more than about 1 to 2 percent.[243] It is important to note that the grandfathered markets analyzed in the *Report in Docket 21284* are extreme cases because of the high levels of marketwide cable penetration and the large number of distant signals that are imported by the cable systems. Thus, it is clear that even in the long term the syndicated exclusivity rules can afford local broadcast stations very little audience protection.

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[241] We also showed that very little protection would be afforded to broadcast stations in the smaller markets if the rules were applicable there because of the small amount of syndicated programming purchased in these markets.

[242] This calculation is based on the estimate that 63 percent of the distant programming could be blacked out. See the *Report in Docket 20988* at para. 59.

[243] In this case we estimate that only 10 percent of the distant programming could be blacked out pursuant to the syndicated exclusivity rules. See *id.* at n. 48.

209. We concluded that the maintenance of the syndicated exclusivity rules would provide no improvement in the television service provided by local stations. We found that the level of profits for the television industry is expected to continue to increase even without any protection against distant signal importation by cable television systems and that cable television has little effect on the local public service programming provided by broadcast stations.

210. Several parties have voiced the same general criticisms of our analysis of audience diversion due to cable in the *Report in Docket 21284* to our analysis of audience diversion due to the elimination of the syndicated exclusivity rules in the *Report in Docket 20988*. For example, NAB contends that the "Commission's treatment of audience losses resulting from importation of duplicative syndicated programming is inadequate, primarily because of the Park study on which it relies is flawed and inadequate."[244] In its section on syndicated program exclusivity, INTV states that "of particular concern to INTV is the failure of the Cable Bureau to analyze impact in terms of 'fringe time'—the time period before and after prime time."[245] Capital City *et al.* argue that the long-term incremental effect of eliminating the syndicated exclusivity rules should include audience diversion due to the normal growth of cable television that is not attributable to the elimination of the rules. However, we have already shown in detail the invalidity of these general criticisms in the previous section of this *Report and Order*, and, accordingly, we do not believe it would be fruitful to reiterate that discussion here.

211. A few parties also have directed criticisms to the analysis appearing only in the *Report in Docket 20988*. For example, the Joint Motion contends that "it appears that the presentation of the basic findings of the Park Study in the Economic Inquiry Report [sic] is replete with numerous errors, which raise very serious questions as to the Commissioners' reliance on the staff summaries rather than the Park Study itself. Thus, for example, on Tables 2 and 3 in the Report (presented on pages 35 and 37), the 'percent Audience Loss' figures cited are *fractions* of the actual Park data."[246] (Emphasis in original.) We believe this criticism may have been voiced because of petitioners' inadvertently regarding the tables referred to as part of the *Economic Inquiry Report* when they are in fact found in the *Syndicated Exclusivity Report*. In any event, the parties obviously did not

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[244] *Supra*, n. 93 at p. 143.

[245] *Supra*, n. 94 at p. 34. Several parties also suggest that impact should be analyzed in terms of syndicated programming because audience diversion during syndicated programming is greater than average and the revenue/audience ratio for this programming also is greater than average. We view this suggestion as functionally equivalent to that of analyzing impact in terms of early fringe. It makes very little difference to the "bottom line" estimates of audience diversion in either case. See Section II above.

[246] *Supra*, n. 92, at 24.

understand that the estimates in Tables 2 and 3 *were* meant to be fractions of the actual Park data. These tables provide estimates of the effect on local station audiences of eliminating the syndicated exclusivity rules. The Park study provides estimates of the overall audience diversion due to cable in the absence of distant signal restrictions *and* syndicated exclusivity protection. Since not all of the programming on distant signals could be blacked out pursuant to the syndicated exclusivity rules, only a fraction of the total audience diversion due to cable in an unregulated market could be protected by the rules. Thus the "serious questions" raised by the Joint Motion of the "staff summaries" represent a misunderstanding on the petitioners' part.

212. Capital City *et al.* contend that the Commission's procedure for estimating the potential effect of eliminating the syndicated exclusivity rules on local station audiences "seriously understates the actual likely impact in markets [with eight local signals] since Park has calculated the extent to which a typical distant signal is blacked out by the syndicated exclusivity rules only in markets with six or fewer local stations."[247] For example, in the *Report in Docket 21284* we reported that Park estimates that 63 percent of distant programming could be blacked out pursuant to the syndicated exclusivity rules in markets with six local stations. Since Park did not estimate the percentage of distant programming that could be blacked out in markets with eight local stations, and in the absence of other estimates for these markets, we assumed that 63 percent of the distant programming could also be blacked out in markets with eight local stations. We do not believe this assumption leads to a "serious" understatement of audience diversion. For example, even if 80 percent of the distant programming carried by cable systems in markets with eight local stations could be blacked out pursuant to the syndicated exclusivity rules, our estimates in Table 2 for the near-term would increase by only one percentage point and our estimates in Table 3 for the long-term would increase at most by only two percentage points.

213. INTV alleges that "the Comments and Reply Comments filed by INTV in Docket 20988 demonstrated the need for the syndicated program exclusivity rules. The Cable Bureau did not contradict (or even respond to) INTV's arguments."[248] The theme of INTV's most substantive argument in the referenced comments was that "the syndicated program exclusivity rules are still of continued importance for the future viability of the independent television industry."[249] To

[247] *Supra*, n. 91, at 15.

[248] *Supra*, n. 94, at p. 36.

[249] Association of Independent Television Stations, Inc., comments in Docket 20988, March 1, 1977. INTV also claimed that: 1) syndicated program exclusivity protection was a basic tenet of the "Consensus Agreement"; and 2) the syndicated program exclusivity rules do not cause cable viewers to lose any programming, but rather, foster diversity of programming to the public. At para. 48 of the *Report in Docket 20988*, we said that we did not regard the Consensus Agreement as a reason

substantiate its argument, INTV had presented audience data for cable and non-cable households in Seattle and San Francisco. INTV had contended that "these examples clearly indicate the fractionalization of audience which takes place as a result of importation of distant signals when there is no exclusivity protection. The Seattle-Tacoma and San Francisco-Oakland-San Jose markets are not atypical, and what is happening there provides an insight into what will be happening in other markets in the future as cable continues to develop."[250] We agreed with the latter statement. It is precisely the reason for which we analyzed the effect of cable television on the local independent stations in these markets.[251] This analysis constituted our response to INTV's comments. We found that cable television augments the audience of the independent station in Seattle by 3 to 5 percent and increases the audience of the two UHF independents in San Francisco by an even greater amount.[252] On the other hand, the VHF independent in San Francisco loses between 4 and 7 percent of its audience due to cable television and only a percentage of this diversion would be attributable to the absence of syndicated exclusivity protection. However, we found this station has realized tremendous growth in revenues and profits during the period for 1972 to 1977. Thus we rejected INTV's contention that the syndicated exclusivity rules were essential to the viability of independent television stations.

214. In its latest comments in this proceeding dated September 17, 1979, INTV refers to the study performed by Roger Cooper and Associates, submitted as comments by McGraw-Hill Broadcasting Company, Inc. and Storer Broadcasting Company for additional support for the proposition that some independent stations would not be able to remain viable without the ability to protect at least the portions of their schedules being duplicated by distant signals. The Cooper study allegedly demonstrates a reduction in the audiences of the Bakersfield stations of more than 69 percent. We analyzed the effect of cable television on the stations in Bakersfield in our

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to refrain from rules changes and INTV has made no new argument not considered at that time. In this regard, see also *Geller v. FCC*, 610 F. 2d 973 (D.C. Cir. 1979) requiring that these rules be reviewed. At paras. 69 and 91–3 the *Syndicated Exclusivity Report* we concluded that the rules adversely affect the subscribers and potential subscribers of cable systems.

[250] *Id.*, at p. 19.

[251] *See* the *Report in Docket 21284* at paras. 127–129.

[252] It is perhaps worth noting that Kaiser Broadcasting, then the licensee of KBHK-TV, one of the two UHF stations in San Francisco, in its March 7, 1977 filing in Docket 20988 (pp. 16–17) relied on the INTV filing in complaining of the adverse audience effects of cable operations without noting that the INTV data showed KBHK-TV's cable audience share to be almost triple that which it received off-the-air. In addition, the data supplied by INTV, which purported to reflect the entire San Francisco ADI, actually did not include San Francisco, Alameda County west, or Napa County north. More complete data is shown for KBHK-TV at p. 811 of the *Economic Inquiry Report*.

grandfathered market analysis in the *Report in Docket 21284*. We found that while these stations may lose as much as 13 percent of their potential audience due to cable, their revenues had increased by almost $3 million from 1972 to 1977, an increase of over 100 percent. Thus we believe the contention that some stations will not remain viable without syndicated exclusivity protection is simply invalid.

215. Several parties also have advanced some unsupported theories concerning the syndicated exclusivity rules in their comments to our *Notice of Proposed Rulemaking in Dockets 21284 and 20988*. For example, NAB claims that "the lack of syndicated exclusivity protection may result in total withdrawal of syndicated programming from local broadcast exhibition."[253] This claim is without merit. Program syndicators attempt to sell their product in virtually every market regardless of the potential audience size, provided they can cover their distribution costs. Thus we find it extremely unlikely that these syndicators will not sell their products to the stations in a market because they attract at most a few percent less audience due to the absence of syndicated exclusivity protection. In fact, the stations in our grandfathered market analysis do purchase programs that are imported by cable television systems from distant markets. Additionally, syndicators often sell the same programs to stations situated in adjacent markets such as Washington, D.C. and Baltimore, Maryland, where the programs from both markets can be received readily by a large proportion of the households in these markets. Moreover, there are many sources of program supply. If one syndicator refuses to sell its products in a market, its competitors eagerly will fill the void. Thus we cannot accept the argument that syndicated exclusivity protection is essential for local stations to be able to compete in the marketplace.

216. Nor can we accept the argument advanced by several parties in this proceeding that the financial base of television is such that the industry could not survive in the absence of program exclusivity. Local stations are aware of the competition that they face and negotiate over the price of syndicated television programming accordingly. The syndicated exclusivity rules restrict competition and thereby protect the high profits that television broadcasters capture in the absence of competition. In contrast to the allegations raised in the comments, we believe that increased competition from cable television will not decimate the television broadcast industry, but rather will act to improve the performance of television broadcasters.

217. In summary there has been little criticism directed specifically to our analysis of the potential effect of eliminating the syndicated exclusivity rules on local television stations. Moreover, we found these criticisms to be without merit. Several parties also have reiterated their general criticisms of our findings of the overall effect of distant signals on local stations. These criticisms have been shown to be invalid

[253] *Supra*, n. 93, at p. 19.

in Section II, *infra*. It should also be noted that no new evidence has been submitted since our issuance of the *Notice of Proposed Rule Making* in this proceeding that shows our conclusion concerning audience diversion is incorrect. Therefore, we remain confident that the potential effect of eliminating the syndicated exclusivity rules on local station audiences will be minor. In the near term the loss to any local station would be no greater than about 1 percent. In the long run the effect will be greater, but in all likelihood will be considerably less, for all stations, than our theoretical worst-case projection for some stations of 9 percent. For example, our case studies suggest that the potential impact of eliminating the syndicated exclusivity rules will rarely be as large as 4 percent for any station in the foreseeable future. We have relied upon the evidence in the *Report in Docket 21284* and the analysis of Section II of this *Report and Order* to conclude that audience diversion of this magnitude will not hinder the television service provided by local broadcast stations.

The Impact of Eliminating the Syndicated Exclusivity Rules on Program Supply

218. The syndicated exclusivity rules were, as indicated above, rationalized when they were adopted not only as protections for local television broadcasters but as necessary "to insure the continued supply of television programming."[254] In the preceding section we determined the protection that the rules afford local broadcast stations will not lead to any significant benefits for consumers in the foreseeable future. Thus, we are left in this section with the determination of the effect of the rules on program supply. It should be emphasized, however, that the effect of the rules on program supply is derivative of the effect of the rules on local broadcasters.

219. Traditionally, we have been concerned that without syndicated exclusivity protection the production of television programming would diminish.[255] We though that if local stations would pay less for

[254] *Cable Television Report and Order*, *supra*, p. 169.

[255] It should be noted that our authority to adopt remedial regulations in response to concerns of this nature is far from clear. In another proceeding (the TV re-run proceeding referred to above) the Commission raised questions "as to whether this subject—the welfare and viability of the program production industry and employment in it—affords a basis for Commission regulation in the public interest." *Report and Order in Docket 20203*, 61 FCC 2d 946, 950 (1976). The situation presented was found to afford no basis for action and the Commission went on to say:

> We are persuaded that it is not this Commission's province to engage in regulatory action (by rule or otherwise) with the purpose, or largely for the purpose of furthering employment or economic conditions in a particular industry or a particular part of the country. While the Communications Act terms "public interests, convenience and necessity" encompass many concepts, and their scope has grown wider with time, there is no reason to believe it extends this far. (footnote omitted). *Id.* at 950.

programming because of the decreased audience they would attract in competition with less proximate broadcasters and if producers were not idemnified by cable television systems for the use of their product, the economic incentive to produce original words would diminish, resulting in a reduction in the supply of programming. Thus the syndicated exclusivity rules were adopted, in part, as a copyright remedy for the retransmission of broadcast signals by cable systems.

220. Our *Report in Docket 20988* analyzed the effect of the syndicated exclusivity rules on program supply even though we doubted the authority of this Commission to assign copyright liability for the retransmission of broadcast signals by cable television systems in the absence of debilitating economic competition to local broadcast stations. Our analysis, however, was predicated upon the applicability of the compulsory licensing system established by Congress. Thus we investigated the effect of the syndicated exclusivity rules on program supply under the auspices of compulsory licensing. A summary of those findings is presented here.

221. Our *Report in Docket 20988* found, unsurprisingly, that the price of television programming is determined by the interaction of supply and demand in the marketplace. The prices paid by television broadcast stations for programming were shown to be correlated strongly with advertisers' demand for commercial time, thus corroborating the expectation that the revenue a broadcaster anticipates from exhibiting a particular program will affect significantly the price paid for the program. We determined, therefore, that the effect of the syndicated exclusivity rules on the price paid for television programming by local stations depends largely on the amount of audience that the rules protect. We had found, however, that the elimination of the rules would reduce local station audiences by no more than about 1 percent at the present time, even if all of the stations that were entitled to protection were receiving it. Thus we concluded that the elimination of the syndicated exclusivity rules would have a minimal effect on the prices paid for programming and therefore would have no perceivable effect on the supply of television programming over the near term. Or, stated differently, we concluded that the rules do not confer any present benefits on the public in the form of an expanded supply of programming.

222. Over the long term we had found that the audience protection afforded by the syndicated exclusivity rules would increase, theoretically approaching nine percent for some stations, although the likely figure would be much less. Thus we analyzed more carefully the potential effect of the rules on the supply of programming in the long run. We were unable to establish any definitive effect. For example, while local broadcasters may pay less for programming because of the reduced audience resulting from the unrestricted cable importation of distant signals, we noted that it is likely that these distant stations will pay program producers more because of their increased audience

circulation. We found that total payments to producers from broadcast stations may remain unchanged or may even increase as a result of the elimination of the syndicated exclusivity rules. However, even if the elimination of the rules were to affect adversely the total payment to producers, we could not determine whether this would cause any perceivable reduction in the supply of programming in comparison to what it otherwise would have been. For one thing, the importation of distant signals by cable television plays only a very small part in determining the overall payments to producers. Our *Report* found that both the overall payments to producers and the supply of television programming will continue to increase over the long term even with the complete deregulation of cable television. Second, we were unable to establish that reduced payments to producers would affect significantly the supply of programming. We noted the divergence of scholarly thought on this matter appearing in the literature. Essentially, there is general disagreement about the extent to which lower payments to producers merely result in lower rents being paid to performers and other factor inputs. For example, some authors argue that reduced payments show up largely as reductions in rents paid to performers without adversely affecting the supply of programming to any significant degree. We were unable to test this theory empirically, however, because of the general unavailability of data on the program production industry.

223. Finally, we noted that even if the above chain of events would unravel in a manner that resulted in the supply of programming being less than what it otherwise would have been with the protection afforded by the syndicated exclusivity rules, the Copyright Revision Act of 1976 provides a mechanism to prevent any adverse reallocation of resources from the program production industry to the cable television industry from occurring.[256] Thus we were unable to ascertain that the supply of programming would be less than what it otherwise would have been in the long term because of the elimination of the syndicated exclusivity rules.

224. Our *Report* concluded that the near-term effect of eliminating the syndicated exclusivity rules on program supply is inconsequential. We found the effect in the long term to be less determinate, but we were able to conclude confidently that the program production industry will continue to prosper and the overall supply of television programming will continue to expand.

225. The criticisms of our analysis of the effect of the elimination of the syndicated exclusivity rules on the supply of programming include no attempts to refute its results empirically. No new evidence has been submitted to contradict our findings that 1) the program

[256] 17 U.S.C. §801(b)(2)(C). More generally, we noted that Congress has implemented this copyright remedy for cable television, because of the market failure resulting from the unreasonably high level of transaction costs that cable operators would face in bargaining for programming.

production industry will continue to prosper, 2) the supply of programming will continue to expand, and 3) the elimination of the syndicated exclusivity rules will not threaten the continued supply of programming. In the previous section we demonstrated that all of the available information leads conclusively to the result that the syndicated exclusivity rules will provide very little audience protection to local broadcast stations into the foreseeable future. This evidence—alone—would seem to foreclose the possibility of any adverse effects on program supply resulting from the elimination of the syndicated exclusivity rules. Nevertheless we feel obliged to respond to some additional contentions from the comments received in some detail.

226. *Ancient Data.* Our *Report in Docket 20988* stated that the price paid for television programming by local broadcast stations is determined by the interaction of supply and demand in the marketplace. We theorized that prices are greater where advertisers' demand for commercial time is greater (i.e., in the larger markets) and provided some evidence to support this theory. The evidence consisted of the average price per broadcast episode paid by stations for syndicated services in 1968. Our conclusion from this analysis was that the revenue a broadcaster anticipates from a program strongly influences the price paid for that program. The Joint Motion's response to this analysis is that "the reliability and probative value of such ancient data merits serious exploration."[257] The Joint Motion, however, does not proffer any alternative hypotheses that the new data could be used to test. We find no dispute in the record that the revenue a broadcaster expects from exhibiting a particular program will affect significantly the price paid for that program. Thus we find the Joint Motion's contention to be without merit.

227. *Elimination of the Rules Would Be Detrimental to the Production of Syndicated Programs.* Our *Report in Docket 20988* estimated the effect of eliminating the syndicated exclusivity rules on local station audiences over the entire city. For example, we found that elimination of the rules would result in no more than about a 1 percent loss in audience for any broadcast station at the present time. Capital City *et al.*, argue that estimation of the "total average audience [loss] if the syndicated exclusivity rules are terminated is irrelevant to the question of how much particular syndicated programs will be worth to the television station and its advertisers, since specific syndicated programs broadcast by local stations will lose considerably more of their audience." Based upon this belief, Capital City *et al.*, conclude that "the Commission has drastically underestimated the potential impact to the syndicated programming industry."[258] Similarly Metromedia, Inc., argues that the elimination of the syndicated exclusivi-

[257] *Supra*, n. 92 at p. 32.
[258] *Supra*, n. 91 at 17–18.

ty rules would "drastically disadvantage non-network programs vis-a-vis network programs."[259] We disagree with these assessments. We believe the syndicated exclusivity rules protect the audiences of both network and non-network programming of local network-affiliated stations. For example, application of the rules often results in a substantial number of blackouts on distant signals during prime time when network-affiliated stations are broadcasting network programs.[260] This reduction in viewing options translates into increased viewing of prime time network programming. Additionally, our *Report* showed that independent stations, which broadcast mostly syndicated programs, often receive less protection from the syndicated exclusivity rules than network-affiliated stations operating in the same market. Thus, while audience data are not available to estimate the effect of the syndicated exclusivity rules on syndicated programming versus local or network programming, we do not believe the differences are large enough to alter our conclusion.[261] We are not persuaded that the elimination of the syndicated exclusivity rules will disadvantage any one particular segment of the program production industry. But, more importantly, we believe that the elimination of the rules, because of its very small effect on local station audiences and thus program producers, will benefit the subscribers and potential subscribers of cable television without subjecting non-cable households to any significant risk of loss of service.

228. *Compulsory License Fees Are Too Low.* Several parties have alleged that the compulsory licensing fees are too low and/or that the present copyright legislation is inadequate. These parties also contend that elimination of the syndicated exclusivity rules will compound this problem. Finally the parties claim there is no data to justify our belief that the compulsory licensing fees may be adjusted to enable program producers to recoup fully and losses that may occur to them as a result of the elimination of the syndicated exclusivity rules.

229. At the outset, we must establish that this Commission has no

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[259] Comments of Metromedia, Dockets 20988 and 21284, September 17, 1979 at ii.

[260] *See, e.g.*, the Comments of the National Cable Television Association, Inc., Docket 20988, March 1, 1977. In the past cable systems generally have not substituted programming during blackouts because the marginal cost of program substitution exceeded the marginal revenue. *See, e.g.*, B. M. Mitchell and R. H. Smiley, "Cable, Cities, and Copyrights," 5 *Bell Journal of Econ. and Management Sci.* 264 (1974). This may change somewhat with the increased availability of broadcast signals via satellite. However, without distant signal restrictions, application of the syndicated exclusivity rules will result in blacked out channels, including during prime time.

[261] For example, in the previous section we found to be without merit the industry's claim that accounting for the difference in impact from cable television during early fringe (i.e., the period in which mostly syndicated programming is broadcast) would significantly affect our results. Moreover, the effect of the syndicated exclusivity rules on local station audiences is much less than that of unfettered distant signal carriage. Thus accounting for differences between program types in this case is even less likely to affect our results.

authority to invalidate the copyright solution for cable television imposed by Congress or to adjust compulsory licensing fees.[262] Any revision of the fees in light of new evidence of this nature can be made only by Congress or by the Copyright Royalty Tribunal. Moreover, it would be difficult for us to determine the appropriate level of fees. For example, Congress' goal in establishing the fees appears to have been to offset "the damage to the copyright owner" from the distribution of a program "in an area beyond which it has been licensed."[263] Congress exempted cable systems from paying for the right to carry programs purchased by the local stations and by the national networks because such carriage "does not injure the copyright owner."[264] Congress said the copyright owner contracts for these programs on the basis of receiving viewership in cable households and "is compensated accordingly."[265] However, we believe this rationale may also apply to all distant programming carried by cable systems, especially that of superstations. For example, there is no disagreement in the record that superstations presently are paying programmers for their increased circulation.[266] We cannot determine, however, whether this is a stable equilibrium because we do not know whether these stations will receive additional revenue for distant cable viewing. Thus we cannot determine whether the fees are too high or too low given our perception of Congress' goal in setting them. If distant audiences are compensated for, the fees will be too high. Nevertheless all of these factors were considered by Congress in its determination of the appropriate fee level. Thus we believe the complaints and allegations raised in the comments concerning the adequacy of the present copyright legislation for cable television have been directed to an inappropriate forum.

230. Furthermore, Congress has mandated the Copyright Royalty Tribunal to make determinations concerning the adjustment of reasonable copyright royalty fees if the syndicated exclusivity rules are changed. Any adjustments must be reasonable and the Copyright Royalty Tribunal shall consider, among other things, the economic impact of the rule change on copyright owners and users in determining the reasonableness of the fees. Thus we cannot accept the assertion that the elimination of the syndicated exclusivity rules will adversely affect copyright owners because of the inadequacy of the present fee schedule. We also do not believe any data are necessary to support our belief that owners of copyrights will not go unindemnified should a

[262] For further discussion, see Section IV.

[263] Report of the House Committee on the Judiciary, Copyright Law Revision, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 90 (1976).

[264] *Id.*

[265] *Id.*

[266] *See, e.g.*, Superstation, comments in Docket 21284, September 14, 1979. *See also* Tribune Company, comments in Dockets 20988 and 21284, September 17, 1979.

change in the syndicated exclusivity rules do "damage to the copyright owner."[267] Moreover, we do not have jurisdiction to protect program producers *per se*. Thus we find the contentions raised by the commenting parties to be without merit.

231. *Distant Cable Viewers Are Worthless.* Our *Report in Docket 20988* stated that to the extent that television stations are able to receive compensation for the audiences they attract in distant markets we expect their demand for television programming will increase, resulting in greater payments to producers. We concluded that there has been insufficient opportunity to date for the relevant markets to adjust because we are in a transitional period in the growth of superstations. NBC contends, however, that "distant viewing is of no value to local advertisers on the 'superstations' and is not considered economically significant to warrant any substantial increase in the price at which the 'superstation' sells its time."[268] Similarly, MPAA cites the *Report and Order in Docket 20487*, 57 FCC 2d 625 (1976), where the Commission said "distant cable carriage, at this time, does not generally appear to be of significant value to television stations." The reasons specified by the Commission for this conclusion were: 1) the existence of the syndicated exclusivity rules, 2) the lack of information concerning viewing in distant cable communities, 3) the likelihood that distant audiences are worthless to local advertisers, and 4) the possibility that distant signal carriage might not be adequate to reach the advertiser's target audience in the distant market.

232. Several events have occurred since 1976 which suggest a change in reasoning. For example, much better information is

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[267] The Copyright Royalty Tribunal is empowered to adjust the radio if the Commission's rules are changed any time after April 15, 1976. It should be noted that a number of such changes have already been made (see, for example, *First Report and Order in Docket 20553*, 58 FCC 2d 442 (1976) (specialty stations) and *Report and Order in Docket 20496*, 65 FCC 2d 218 (1977) (expanded UHF carriage)), but insofar as we are aware no request for a revision of the fee structure has even been filed with the Royalty Tribunal.

[268] *Supra*, n. 48 at 15. These comments may be contrasted with those of McGraw-Hill Broadcasting (a TV station licensee) in Docket 20988, March 1, 1977, p. 20, that "It is already McGraw-Hill's experience that national and regional advertisers are beginning to view the purchase of time on the Los Angeles stations as a more efficient way to cover this large region than separate time purchases on a number of local stations." AMST would appear to agree with McGraw-Hill by suggesting that, under the retransmission consent proposals, cable systems would likely obtain consents at no cost or be paid to carry distant signals. See comments in Dockets 20988 and 21284, September 17, 1979, at 13. See also "WOR-TV's aims to improve its Image," *New York Times*, March 10, 1980, p. C17, quoting the president of RKO Television as stating that WOR-TV business was "better than it had been in years" in part because "WOR-TV is carried by satellite to cable-television systems around the country." *See also* comments of Rocky Mountain Broadcasters Association, para. 175, *supra*.

becoming available on the viewing of superstations in distant markets.[269] Additionally, there is some indication that national advertisers value highly the audience on cable systems located throughout the nation. For example, Madison Square Garden Sports Network receives a comparable, if not higher, price per viewer for commercial time than broadcast stations receive for commercial time during prime time.[270] Thus marketplace forces may dictate that national advertisers will replace local advertisers to a great extent on superstations and will pay for the added circulation in the distant markets. Whether national advertisers value audience more highly than local advertisers is an empirical question that cannot be answered yet because we are in a transitional period where both novelty and uncertainty over regulatory intervention, among other factors, have hindered the requisite adjustments in the informational and advertising markets that have occurred to date. Nevertheless, we believe it is likely that distant audiences will add revenues to television stations if our regulations permit unfettered distant signal carriage.

233. *The Requisits Data To Estimate Elasticities of Supply Has Been Collected by the Network Inquiry Staff.* Our *Report* found that even under worst-case conditions for the program production industry (*i.e.*, payments to producers actually decrease as a result of the elimination of the syndicated exclusivity rules), we could not determine the effect on program supply due to insufficient information to estimate elasticities of supply. We further noted that even with the requisite data any judgment of the effect of a change in the supply of television programming on the welfare of television viewers could be no more than conjectural. In contrast, Tribune Company asserts that the requisite data to estimate the elasticity of supply of television programming has been submitted in the Network Inquiry.[271] Tribune Company has not, however, pointed to any information provided in that proceeding which would dictate a change in our findings. Moreover, we are not persuaded that this information can be used to estimate elasticities of supply for policy making purposes. For one thing, information concerning first-run syndicated programming, which historically has been our major concern with respect to the syndicated exclusivity rules, is in a form suitable for analysis for only two programs. But more importantly, the elasticity of supply cannot be measured because there is no adequate method available to compare and measure the differences in quality among programs. We are aware of no information and have been cited to none that has been submitted

[269] *See* Nielson Station Index, *Coping with the Complexity of Cable in the 80's (1979).*

[270] *See* "Measuring Cable Audience: Systems Differ on Need for It," *Television/Radio Age* at 82, August 13, 1979, where it is reported that "MSG's average sports event reaches roughly 100,000 viewers, for which MSG's ad rate is $650 per minute. *See also id.* at 44.

[271] Tribune Company, comments in Dockets 20988 and 21284, September 17, 1979, n. 14 at 31.

in the Network Inquiry proceeding which contradicts our conclusion that the program production industry will continue to prosper and the supply of programming will continue to expand even with the deregulation of cable television.

234. *Dire Predictions for Program Supply Ignored.* Our *Report* concluded that the supply of television programming will continue to increase even with the elimination of the syndicated exclusivity rules. Several parties disagree with this conclusion and refer for support to a scholarly journal article on copyright liability for cable television by Besen, Manning and Mitchell which was submitted as a comment in this proceeding.[272] Specific reference is made to the belief of the authors that:

> The continuation of the FCC's exclusivity provisions will significantly diminish the potential adverse impact on program suppliers of the compulsory licensing provisions of the general revision.

MPAA claims that the Commission's "refusal to examine and weigh th[is] evidence is highly arbitrary and capricious, and raises serious questions as to the objectivity of the Commission's staff."[273]

235. Several points are noteworthy with respect to this criticism. First, the article by Besen, Mitchell and Manning was examined and weighed. The *Report in Docket 20988* describes the divergence of opinion appearing in the scholarly literature concerning the effect of reduced payments to program producers on program supply (i.e., the worst-case effect of eliminating the syndicated exclusivity rules), including specific reference to the article by Besen *et al.* Second, the conclusion of the authors of this article is based in part on the belief that "about half of the local independent's audience will be lost if two additional independent stations are imported."[274] In contrast, our analysis in the *Report in Docket 21284* has shown that UHF independent stations often are benefited and VHF independent stations sometimes are benefited by cable television within their local ADI market, even when a large number of distant signals are imported. Third, Besen *et al.* make no attempt to explicate the effect of the syndicated exclusivity rules on local station audiences. Finally, the scope of the analysis by Besen *et al.* is different from that of ours. A major theme in that article is that copyright holders should be able to extract the maximum economic value that cable subscribers derive from television programming and if that value is not great enough to benefit the copyright owner, the copyright owner should be able to exclude cable subscribers from the benefits of its programming. In

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[272] *See* S. M. Besen, W. G. Manning, and B. M. Mitchell, "Copyright Liability for Cable Television: Compulsory Licensing and the Coase Theorem," 21 *Journal of Law and Economics* 67 (1978).

[273] Motion Picture Association of America, comments in Dockets 20988 and 21284, Sept. 17, 1979.

[274] *Supra*, at n. 272 at p. 31.

contrast, our concern in analyzing the syndicated exclusivity rules is that the importation of programming by cable systems does not reduce the overall payments derived by program producers from television stations to the detriment of consumers, given the compulsory licensing scheme enacted by Congress. As noted above, new audience data suggests that very little or no harm will occur to local broadcast stations and therefore to program producers in the foreseeable future if the syndicated exclusivity rules are eliminated. Moreover, since the syndicated exclusivity rules act to restrict the growth of cable television and thus reduce the number of outlets to which program producers can sell their products, the rules may have the adverse effect of reducing the revenues of the program production industry.

236. Additionally, the Joint Motion interprets incorrectly the conclusion of Besen *et al.* to be necessarily in conflict with ours. Besen et al. conclude that the elimination of the syndicated exclusivity rules will diminish the supply of programming. The proper interpretation of this conclusion for our purposes, however, is that the authors believe, based on certain stated assumptions, that the elimination of the rules will diminish the supply of programming compared to what it otherwise would have been in the future. Our *Report in Docket 20988* showed that the supply of television programming has increased significantly from 1971 to 1977, even though syndicated exclusivity protection has been received in only a small number of cases. Furthermore, we concluded that the supply of programming will continue to increase into the foreseeable future, even with the deregulation of cable television. On the other hand, Besen *et al.* make no inferences for the *overall* supply of television programming in the future. Thus their conclusion is not necessarily inconsistent with our conclusion that if there is any impact on program supply from the elimination of the syndicated exclusivity rules, it will be manifested in a reduction in the rate of growth of program supply rather than an absolute decrease in the supply of programming.

237. *Grandfathering.* Our *Notice of Proposed Rulemaking in Dockets 21284 and 20988* invited comment on the proposal that each program exhibition license in effect on April 25, 1979 be grandfathered under the existing syndicated exclusivity rules for a period of three years or until expiration of the contract, whichever occurs sooner. Our reasoning, in the *Report in Docket 20988*, was that broadcasters may receive compensation different from that anticipated at the time of negotiation of the contract. We believed that since this dislocation would be partly regulatory in nature, it may be desirable to provide a transition period by grandfathering existing program supply contracts.

238. Several parties have responded to this proposal. Broadcast interests contend that the grandfathering period should be extended because contracts often run for longer than three years. In general these comments represent "votes" in favor of the proposal or an extended version of it rather than data or, in some cases, even

arguments as to why it should be adopted. No comment has shown any *public* benefit in providing any grandfathering protection for existing license contracts.

239. Cable television interests, on the other hand, argue that the grandfathering of existing contracts is neither necessary nor in the public interest. They cite the conclusion of the *Report in Docket 20988* that no more than about 1 percent of local station audiences will be lost due to the elimination of the syndicated exclusivity rules. A-R Telecommunications Division of Adams-Russell Company, Inc. *et al.*, argue that "this impact, which the Commission found clearly did not warrant continuation of the exclusivity rules when balanced against the benefits to the public to be gained by immediate repeal of the rules, dictates that the Commission should not institute an interim grandfathering period."

240. While we concluded that the public would be served best without the blackouts on distant signals resulting from the syndicated exclusivity rules, we felt that some transitional dislocations may result without grandfathering provisions because the contracts were written in contemplation of the existing rules. Upon reconsideration, however, we believe that the absence of any evidence suggesting that these transitional dislocations will redound to the detriment of the public forecloses us from extending the grandfathering provisions to cover existing contracts.[275] Given the absence of public benefits, the relatively small amount of audience implicated in this issue, and the complexity and difficulty associated with the administration of these rules both for the recipients of benefits under it and for the Commission and these subject to it, we are not persuaded that the grandfathering proposal can be justified.

Conclusions.

241. Our analysis of the effect of the syndicated exclusivity rules on television service to the public is similar in many respects to that of the effect of distant signals. The principal difference is that the syndicated exclusivity rules were adopted not only to protect local broadcasters but also to protect the continued supply of television programming. In both cases, however, we rely upon three well-established criteria for ascertaining the public interest: consumer welfare, distributional equity, and external effects.

242. In Section II we have shown in great detail that the protection afforded to local broadcast stations from restricting distant signal carriage on cable television systems disserves the public interest. We found the effect of distant signal carriage on the financial health of television broadcasters is small in relation to the normal growth in

[275] See *FCC v. National Citizens Committee for Broadcasting*, 435 U.S. 912, n. 24 (1978). Moreover, that there will even be private injury is not something that can be assumed given the ability of cable television operators under the provision of the rules to substitute alternative programs for those deleted.

the industry's financial prosperity. Additionally, audience losses due to cable television were found to have little effect on the local programming of television stations. We concluded that distant signal carriage improves television service to cable subscribers without subjecting non-cable households to any significant risk of harm. Since these results are derived for the carriage of distant signals that are not subject to blackouts from application of the syndicated exclusivity rules, the results also apply to the elimination of the syndicated exclusivity rules, but with even greater force. Moreover, in view of these findings and in light of the system created in the 1976 Copyright Act for indemnifying copyright owners, we are unable to conclude that elimination of these rules will have adverse consequences for the supply of television programming the public receives. These rules serve no valid communications policy purpose.

243. On the other hand, we believe that the syndicated exclusivity rules impose significant costs upon the subscribers and potential subscribers of cable television. Therefore, by weighing both the expected costs and benefits of the rules to consumers, we conclude that the public will be served better without the syndicated exclusivity rules for cable television systems.

IV. Retransmission Consent

Background

244. As previously described briefly, cable television systems have no *direct* financial or contractual nexus or responsibility either to the television broadcasters whose signals they carry or to the creators or owners of the programs that are broadcast on these stations.

245. With passage of the Copyright Revision Act of 1976, Congress established the copyright obligations that were to govern the relationship among these parties. Under this statute cable television systems pay a percent of their gross revenues to the Register of Copyrights for the right to carry distant signals and for each distant signal or "distant signal equivalent." The fees payable are to some extent variable according to system size but the schedule for the larger systems provides roughly that 0.675 of 1 percentum of the system's gross revenues must be paid for the first distant signal, 0.425 of 1 percentum for the second, third, and fourth signals, and 0.2 of 1 percentum for the fifth and each additional signal. Each independent station is one distant signal equivalent. Each distant network or non-commercial educational station is one quarter of a distant signal equivalent. The money received by the Register of Copyrights is then distributed to the copyright owners whose works were carried by cable television systems by a separate Copyright Royalty Tribunal. In addition to disbursing the copyright fees paid by cable television systems, it is also the function of the Copyright Royalty Tribunal to alter the rate structure specified in the law, both to assure that the real constant dollar value of the royalty fee per subscriber is maintained and to assure that the

fee structure remains appropriate if the rules of the Federal Communications Commission are amended to permit the carriage of additional distant television broadcast signals or to change the syndicated program exclusivity requirements.

246. With the enactment of this legislation, Congress spoke for the first time on an issue that was first raised with respect to cable television in the late 1940's, which was before the Supreme Court on two separate occasions, which engaged the attention of the Congress itself for almost twenty years, and was considered one of the most important and controversial of the issues involved in the revision of the copyright act.

247. During the period leading up to the enactment of this new law, the Courts, the Congress, and the Commission were each prevailed upon to remedy what was regarded as the problem created by the failure of cable television systems to make copyright payments or participate in the markets then existing for the sale and distribution of television programming. Action was thought necessary to promote economic efficiency in television program distribution markets, to prevent unfair competition between cable television systems and television broadcasters, to eliminate adverse impacts on the supply of television programming, and to protect property rights in creative works.

248. Although Congress has now amended the copyright law in response to these concerns, the mechanism chosen is still regarded by some as inadequate. Government, it is said, is still interfering in this process by setting copyright fees and participating in their distribution and this situation should be replaced by rules that establish a market mechanism for setting rates and for regulating the flow of distant signals.

249. That we undertake an effort was forcefully urged on us by the National Telecommunications and Information Administration of the Department of Commerce in a rulemaking petition considered in connection with our *Notice of Proposed Rule Making* in this proceeding. Put in its starkest terms what is urged is that new cable television systems or those expanding or adding signals be permitted to do so only upon receipt of permission from the originating station and that we should adopt this proposal regardless of whether it has adverse consequences for local television broadcast service or whether it results simply in retransmission consent denials and the cessation of cable television distant signal carriage.[276]

[276] As set forth in the NTIA comments in this proceeding the proposal is actually somewhat more complicated. As described therein the retransmission consent fee would be a "reasonable" one (p. 9), the Commission would supervise the operation of these rules "to police abusive practices, such as 'warehousing' " (p. 10), if necessary "either by rule or on an *ad hoc* basis" the Commission could exempt smaller, rural systems or those outside the top 100 markets (p. 7), the Commission would give " *ad hoc* consideration of station claims of substantial injury" (p. 17) and "on its own investigate serious injury claims by small market stations." (p. 21).

250. In reviewing this proposal in our *Notice of Proposed Rule Making* we noted that it had some "considerable theoretical attractiveness" para. 83, :,1 supra and "that a market solution to the problems of compensating owners of programming materials for their commercial use is desirable." Para. 81, *id.* We noted that:

> The existing compulsory license system substitutes regulatory judgment about the proper treatment of program rights for the normal market process that rewards holders of copyrights. So, too, does the retransmission consent proposal prejudge the type of market institutions that can best deal with the protection of equities. It is argued that if broadcasters succeed in raising advertising rates to reflect distant audiences, imported stations will want to have their signals retransmitted even if no retransmission fee is paid. *Id.*

251. "The Commission's preference," we said, "would be to give markets the opportunity to work and to impose regulatory judgments on how transactions should take place only on demonstration that a private market will not work." *Id.* We also noted that the retransmission consent proposal appeared to be the functional equivalent of full copyright liability and that, in view of the recent explicit Congressional rejection of full copyright liability in its 1976 Copyright Revision Act, there were questions as to our legal authority to adopt the proposal. In order to aid us in reviewing this matter, we sought comments "on how the markets in program rights might develop, and what actions, if any, the Commission can legally take that would serve that end." *Id.*

252. The comments received in response to this invitation add very little to the store of economic information available relating to this subject. Moreover, although the legal issues are briefed in considerable detail, there is little to dispel our initial doubt concerning our authority to engage in the type of regulation urged for the purposes that are urged. In fact, the continuation of this legal debate persuades us that even were there evidence of a real and immediate problem calling out for resolution, that this, among all of the regulatory tools that might be available to us, is the one most difficult to sustain because of its recent and distinct rejection by Congress. In order to demonstrate as clearly as possible that this view is correct, and not merely a retreat from responsibility in the guise of an overly narrow reading of our authority, some fairly detailed review of the arguments and history of this issue is required. For the sake of completeness, this discussion to some extent repeats that set forth in the *Notice of Proposed Rule Making*. The arguments that we ultimately find to be persuasive are twofold: 1) that this is an issue, whether labeled a matter of copyright or communications policy, that Congress considered almost *in haec verba* and chose a different path to follow, and 2) that the objectives sought by this rule—protection of program suppliers from economic injury and the preservation of existing market structures for the sale of television programming—are remote to the responsibilities assigned to this agency.

Comments

253. The principal proponent of the retransmission consent proposal continues to be the National Telecommunications and Information Administration. In fact some of the other principal commenting parties in this proceeding such as the Motion Picture Association of America and the Association of Independent Television Stations largely or entirely defer to NTIA to carry this issue. NTIA perceives the central issue before the Commission to be "how cable will develop in the major markets, rather than how it will develop in the small towns or markets" (NTIA comments, p. 7), and the critical consideration in this major-market development to be the system's importation of non-network programming. NTIA perceives the necessity for the imposition of a retransmission consent requirement in the fact that although broadcasting and cable are the two principal means for distributing non-network programming, broadcasters must negotiate directly with program producers and pay a negotiated price for program product while cable enjoys a compulsory license to carry its programming, and thus need not enter into direct negotiations or pay for it. NTIA sees this as a "skew" of the marketplace in favor of cable, which eliminating the present rules will not resolve. Indeed, NTIA argues that if the distant signal and syndicated exclusivity rules were deleted without imposing a retransmission consent requirement a number of serious "anomalies" involving exclusivity arrangements could occur.[277] To reconcile this "incompatibility" between broadcasting and cable, NTIA recommends the imposition of a retransmission consent requirement on new or expanding major-market cable systems, to "force" them to "enter the program marketplace and compete with local broadcasters for the right to distribute programs in the area served by cable." (NTIA comments, pp. 8–10). NTIA states that its retransmission consent proposal would exhibit a "rational symmetry" with other policies and processes, including the distribution system for pay cable programming, the requirement that translators, which are similar to cable, obtain rebroadcast consent from originating stations under Section 325(a) of the Communications Act, and the promotion of first-run syndicated programming. *A fortiori*, the Copyright Royalty Tribunal, "as only another government agency adjusting a government-ordained schedule," is an unsatisfactory alternative to marketplace control by retransmission consent. Although NTIA admits that it would be preferable for Congress rather than the Commission to adopt

[277] For example, a local UHF station could obtain exclusive rights for non-network programming as against other stations in its market but not against cable systems in the market carrying the same programs on distant signals; sports entrepreneurs can similarly obtain exclusivity for league games as against local commercial and STV stations but not as against cable; and if "superstations" who are refused sales by copyright owners in attempts to control the distribution of their programs, television viewers in the superstations' home markets, as well as cable viewers, may not get the programs that are withheld.

its retransmission consent proposal, NTIA notes that legislative action is not assured and therefore Commission action is appropriate.

254. With respect to the workability of its retransmission consent proposal, NTIA states that the advent of satellites, and the concomitant increase in demand for new program sources and in the number of broadcasters, nonbroadcast programming entrepreneurs, and middlemen seeking to produce them, will make retransmission consent a success now despite its failure a decade ago. Even if its prognostication were proven wrong, however, NTIA states that the marketplace answer will simply be that major-market cable will have to succeed with a service offering of enhanced reception of local signals, pay cable, and interactive services such as "Qube." On the more precise question of how its retransmission consent proposal would work in practice, NTIA suggests that perhaps the distant stations would be in a position to pay program suppliers more in light of their enlarged cable audience, and recoup these expenses from advertisers, or perhaps they may charge systems a fee for securing retransmission consent for them; on the other hand, systems could establish funds from subscriber revenues for programming or the whole process could be managed by brokers. In any event, "the government does not have, and should not have a blueprint here." (NTIA comments, p. 9.)

255. NTIA would grandfather existing, non-expanding major market systems. Noting that such systems "were built upon the basis of either no copyright payment, a right twice judicially-confirmed, or of compulsory licensing under the Copyright Revision Act of 1976," NTIA states that "it would be inequitable now to change the rules for them." (NTIA comments, p. 17.) NTIA would, however, continue to enforce the syndicated exclusivity rules (with the exception of the off-network program pre-clearance requirement) against such systems in the fifty largest markets and extend them to the second fifty largest markets. If its suggested program of retransmission consent with grandfathering is not adopted, then NTIA proposes that the Commission retain the syndicated exclusivity rules for the top fifty markets and extend them fully to the second fifty as well. In so doing, NTIA emphasizes that its proposal is not premised on potential impact, but rather on accommodating the public interest and in deference to longstanding territorial exclusivity practices.

256. NTIA finds the passage of the Copyright Revision Act no bar to the adoption of its retransmission consent proposal because:

> The cable copyright provisions are a compromise, taking the situation as given at that time—small town cable. NTIA's retransmission consent proposal does not disturb that resolution. Congress did not address the future of cable in large metropolitan areas, and did not foreclose the Commission from addressing this new situation under communications policy. Requiring retransmission consent for cable's independent signals in the cities, together with the grandfathering of the existing small town cable, will provide a sound communications policy framework for cable's development in new directions as well as respect the copyright compromise Congress made in 1976 for cable as it had then evolved.

NTIA comments, p. 50. More specifically, NTIA argues that under its retransmission consent proposal it would be the broadcaster, rather than the cable operator, that would be required to secure from the copyright owner the right to distribute programs to its service area as enlarged by cable. This, NTIA asserts, is entirely consistent with the Copyright Act as well as posing no practical problems for the broadcaster. Should the broadcaster charge cable systems for expenses incurred in granting retransmission consent, NTIA views the charge as "a matter for marketplace forces" and one which the Copyright Royalty Tribunal could take account of indirectly by adjusting the compulsory license fee.

257. Nevertheless, conceding the possibility that direct negotiations and payments between cable operators and copyright owners could occur, NTIA argues that the Copyright Revision Act would still not preclude Commission adoption of a retransmission consent scheme. In support of this contention, NTIA cites the provisions of Sections 801(b)(2)(B) and (C) of the Copyright Revision Act, which provide for the adjustment of the compulsory license fee at such time as the Commission amends its distant signal, syndicated and sports program exclusivity rules,[278] and the legislative history of the Act, which indicates that this authority was granted the Copyright Royalty Tribunal because the distant signal and exclusivity rules protect the copyright owner.[279] Thus, NTIA argues that the Copyright Act specifically allows the Commission to change its rules based on communications policies even though these changes might affect the copyright royalty fees payable. NTIA further states that the legislative history of the Copyright Revision Act, and indeed the entire history of attempts to resolve the cable-copyright dilemma prior to the passage of the Copyright Revision Act, reflected the fact that the Judiciary Committees of the respective Houses of Congress conscien-

[278] Section 801(b)(2)(B) provides in pertinent part:

> In the event that the rules and regulations of the Federal Communications Commission are amended at any time after April 15, 1976, to permit carriage by cable systems of additional television broadcast signals beyond the local service area of the primary transmitters of such signals, the royalty rates established by Section 111(d)(2)(B) may be adjusted to insure that the rates for the distant signal equivalents resulting from such carriage are reasonable in light of the changes effected by the amendment to such rules and regulations.

Section 801(b)(2)(C) provides in pertinent part:

> In the event of any change in the rules and regulations of the Federal Communications Commission with respect to syndicated and sports program exclusivity after April 15, 1976, the rates established by Section 111(d)(2)(B) may be adjusted to assure that such rates are reasonable in light of the changes to such rules and regulations, but any such adjustment shall apply only to the affected television broadcast signals carried on those systems affected by the change.

[279] H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 176-177.

tiously avoided any interference with the jurisdiction of the Commission over matters of communications policy in their consideration of copyright legislation.[280] Thus, NTIA concludes, the thrust of the copyright scheme is that the Copyright Royalty Tribunal defers to FCC changes in communications policy rather than that the FCC defer to the cable copyright provisions in exercising its authority over communications policy under the Communications Act. NTIA also takes direct issue with the proposition that Commission adoption of its retransmission consent proposal would require the cable system operator to negotiate directly with the copyright owner, thereby countervening the express legislative intent in adopting the compulsory license scheme in that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright holder whose work was retransmitted by a cable system."[281] NTIA concedes that the legislative intent was clearly not to have the system operator negotiate directly with the copyright owner; however, it re-emphasizes that its proposal would only require the system to negotiate with the originating broadcaster; the originating broadcaster would negotiate directly with the copyright owner. Finally, NTIA disputes the contention in the *Notice* that retransmission consent was expressly rejected by the Congress. NTIA notes that the Commerce Committee's rejection of the Commission's 1966 legislative proposal to extend Section 325(a) of the Act to cable television does not establish any lack of Commission jurisdiction to adopt its proposal, citing the Supreme Court's subsequent opinion in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170–171 (1968). Indeed, it cites the fact that the recent consideration of a retransmission consent proposal by the House Communications Subcommittee in a bill to revise the Communications Act as evidence that retransmission consent is a matter of communications, rather than copyright, policy.[282]

258. NTIA finds that the Commission's jurisdiction to adopt its retransmission consent proposal as a matter of communications policy emanates from Sections 325(a), 303(g), (h), and (s) and 307(b) of the Communications Act. NTIA cites the legislative history behind Section 325(a) for the proposition that it was meant to confer on broadcasters the right to control commercial exploitation of a radio communication

[280] The Report of the House Judiciary Committee stated that, while it was aware of the "interplay between the communications and copyright elements of the legislation, the Committee has carefully avoided including in the bill any provisions which might interfere with the FCC's rules or which might be characterized as affecting "communications policy." *Id.* at 89.

[281] *Id.*

[282] H.R. 8333, 96th Cong. 1st Sess. (1976). Section 453 of the bill would have precluded carriage of any signal, local or distant, without the consent of the station or the person who "controls the exclusive rights to the program involved." In the same session rewrite bills were also introduced in the Senate. Neither of these bills, S. 611 or S. 622, contained a retransmission consent proposal.

and that this prohibition was intended to extend to cable as well as to broadcasters.[283] NTIA also states that rebroadcast consent and copyright are two distinct legal requirements, with liabilities arising under separate statutes if one or the other is violated, and that Section 73.1207 of the Commission's rules, which implements Section 325(a), reflects communications policies such as fostering widespread communications in times of emergency and protection of privacy, and includes privately-owned non-broadcast stations and point-to-point government stations, which, like cable television, do not fall within the express language of Section 325(a) but for which consent for rebroadcast must nevertheless be secured from the Commission.

259. NTIA finds the requisite jurisdiction to apply Section 325(a) to cable television in *United States v. Southwestern Cable Co., supra*, and successor cases. Although noting that Section 325(a) was not explicitly treated in *Southwestern*, the Court generally recognized the expansive powers of the Commission to regulate interstate communications by wire and radio in holding that cable television may be regulated to the extent "reasonably ancillary to the regulation of television broadcasting," *Id.* at 178. NTIA also cites *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972), for the proposition that "ancillary to broadcast" jurisdiction enunciated in *Southwestern* is not limited to preventing adverse competitive impact "but extends also to requiring CATV affirmatively to further statutory policies." 406 U.S. at 664. NTIA sees no limitation for its jurisdictional purposes in the recent decision in *FCC v. Midwest Video Corp.*, 59 L. Ed 2d 692 (1979), which vacated the Commission's access and channel capacity rules; rather, NTIA finds support in its holding that the substantive provisions of the Act which delimit the obligations that can be imposed on broadcasters do not have "peculiar applicability to television broadcasting. [Their] force is not diminished by the variant technology involved in cable transmissions." 69 L.Ed. 2d at 706–7. Thus, NTIA holds that retransmission consent is reasonably ancillary not only to Section 325(a) but also to Section 303(h), which authorizes the Commission to establish areas or zones to be served by stations, Section 307(b), authorizing effective local television outlets, and Section 303(s), authorizing the promotion of UHF outlets, and Section 303(g), which empowers the Commission generally to secure "the larger and more effective use of radio." NTIA points out that satellite transmission

[283] *Inter alia*, NTIA cites the statement by Senator Dill on Section 28 of the Radio Act of 1927, the predecessor to present Section 325(a), that

> As to Section 28, providing that no person, firm or corporation shall rebroadcast the material broadcast by a station without that station's consent, it is I think, a very necessary provision. Otherwise, we would have a broadcasting station spending a large amount of money to prepare and present a program as a program from that station, and then under modern methods of rebroadcasting, it could be picked up and broadcast from other stations, and particularly over the wired wireless, and money charged for listening to it . . . 68 Cong. Rec. 2280.

capability and the compulsory copyright license policy present a threat to program diversity by forcing program producers to restrict the availability of their products in order to assure the continued observance of traditional territorial exclusivity. As a result, NTIA predicts that the public in some cases will be deprived of programming entirely; in others, that it will be "syphoned" to pay services; that localism and UHF development will be under-cut, and that the result would be "a skewing of the marketplace to the detriment of all." In sum, NTIA submits that its proposal is a matter of communications policy that is within the Commission's authority to adopt under the Communications Act. Indeed, NTIA contends that under the *Melody Music* doctrine[284] the Commission would be required to explain its disparate treatment of metropolitan cable systems and independent television stations should we decline to adopt NTIA's retransmission consent proposal.

260. The three television networks as well as a number of individual television licensees and licensee groups endorse the retransmission consent concept. Some of these, like WTVC *et al.* and ABC, favor retransmission consent because it will require cable to compete in the marketplace for programming. Many of the commercial broadcast commenters, including 220 Television *et al.*, Bahia de San Francisco, KTVB, Inc., and Bibb Television Inc. *et al.*, stresses the fact that under the compulsory license system cable television receives a massive federal subsidy and thus competes unfairly with broadcasters.[285] 220 Television *et al.* argue that under the present compulsory license system distant signals are effectively "free goods;" they do not reflect the cost or value to the local station, the distant station, or the program supplier. ABC and others argue that this marketplace distortion is aggravated by the advent of superstations. The Association of Maximum Service Telecasters, Inc., contends that the repeal of the rules without the imposition of a retransmission consent requirement would immunize superstations as well as cable systems from competing with local broadcasters in the marketplace, thus rendering the existing program marketplace "meaningless." KOB-TV *et al.* argues that the sale of programming to superstations could destroy its sales value in individual markets thereafter, and states that since the essence of our deregulation proposal is to achieve for the public that which the unfettered marketplace can provide, repeal of the present rules without adoption of retransmission consent to create such a mwrketplace would be self-defeating.

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[284] *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (1965).

[285] For example, the Smaller Market UHF Stations note that the entire cable industry spent $13,000,000 in compulsory license payments last year where as the ABC network alone spent $570,000,000 for programming over the same period. 220 Television, Inc. *et al.* state that cable's royalty payment is roughly proportional to the fees television stations pay for music licenses—about 1 percent of operating revenues.

261. A number of the commercial broadcasters, including KOB-TV *et al.*, Association of Maximum Service Telecasters, the National Association of Broadcasters, and Bahia de San Francisco, addressed themselves specifically to the issue of the Commission's jurisdiction subsequent to the passage of the Copyright Revision Act in 1976. All found the requisite jurisdiction, generally employing the same analysis as NTIA. KOB-TV *et al.* and the Association of Maximum Service Telecasters argue that the Commission's authority under the Communications Act to determine that marketplace regulation of cable would be appropriate and also includes the authority to create by regulation the conditions necessary for the free market to function. KOB-TV *et al.* and AMST also contend that Section 301(d) of the Copyright Revision Act specifically reserves the Commission's jurisdiction to adopt a retransmission consent requirement in the course of a communications policy judgment that the free market should substitute for extrinsic regulation.[286] It is argued in this respect that the Copyright Revision Act was intended to act as a "floor," that the Commission could not relieve cable systems of their obligation to make compulsory copyright payments when they do not directly or indirectly bargain for program rights. KOB-TV *et al.* maintain that it does not, however, establish a "ceiling" on what the Commission may do to achieve the purposes of the Act. They further argue that "repeal by implication," e.g., implied repeal of Section 325(a) by the subsequent passage of the Copyright Revision Act, is disfavored as a matter of law, and that the Copyright Revision Act and Section 325(a) are not repugnant as manifest by the fact that Congress carefully distinguished between matters of communications and copyright policy in enacting the 1976 Act. The Association of Maximum Service Telecasters argues that the validity of a retransmission consent requirement turns on whether it is adopted for legitimate communications policy reasons, not on whether it is incidentally similar to, overlaps, or is more onerous than the requirements of the Copyright Revision Act. Finally, KOB-TV *et al.* argue that the Commission's doubts as to its jurisdiction to adopt retransmission consent are inconsistent with its action in adopting equal employment opportunity rules for its licensees despite passage of Title VII of the Civil Rights Act. It is contended that, just as the Commission's EEO rules have been sustained despite the fact that Title VII represents a comprehensive congressional scheme for dealing with equal employment, the Commission similarly has jurisdiction under the Communications Act to restrict the benefits that would otherwise be available under the Copyright Revision Act.

262. Finally, several of the commenters directly confront the issue of the workability of a retransmission consent requirement. The Association of Maximum Service Telecasters argues that the so-called

[286] Section 301(d) of the Copyright Revision Act provides that "Nothing in this title annuls or limits any rights or remedies under any other Federal statute."

"failure" of the Commission's very limited, experimental retransmission consent program in 1968 is not relevant to the implementation of a nationwide system in 1980, given the advent of superstations, satellites and resale carriers and strong incentives to assure its effective and economical implementation. If the proposal were adopted, it is said to be "very likely that in most cases, cable will end up paying nothing for consent, or may end up being paid to carry distant programs just as television broadcasters are paid by some of their program suppliers, most notably the major networks." The National Association of Broadcasters believes retransmission consent would work because, except where there are already exclusive contracts, program suppliers would sell rights to the highest bidder, whether it be a cable system or a broadcaster. The Association of Maximum Service Telecasters agrees, stating that cable is now so profitable program suppliers could hardly ignore it, and Metromedia, Inc. states that it is aware of two entrepreneurs prepared to act as brokers if retransmission consent were adopted. KOB-TV *et al.* cite pay cable's development as a prototype, and the Association of Maximum Service Telecasters agrees with KOB-TV *et al.* that pay cable and other nonbroadcast programming will provide a "cushion" in situations where obtaining retransmission consent proves difficult. The Post Corporation, while strongly supporting the concept of retransmission consent, states that more than simple consent should be involved. It argues that ownership of programming is the key, and to the extent that Section 325(a) fails to take the element of program ownership into account, a perplexing multitude of rules has resulted, and NTIA's retransmission consent proposal, to the extent it ignores ownership, suffers from the same defect. On the other hand, Post argues, if consent had to be sought from the program owner, marketplace forces would truly govern, and that would be the optimal approach. Finally, KOB-TV *et al.* note their preference for a regulatory rather than statutory retransmission consent scheme because of its greater flexibility.

263. Nine noncommercial television broadcast station licensees, commenting jointly also recommend the adoption of a retransmission consent requirement for all programs of public television stations if the rules on carriage of distant noncommercial stations are deleted. The licensees argue that at least in this manner they would have the opportunity to contract for exclusive rights to particular programs. They state that a retransmission consent requirement would allow a distant noncommercial station to withhold consent where it appeared that carriage of its programming would injure a local noncommercial station, and recognize that cable systems could be required to pay for use of a noncommercial station's programming. These licensees believe they are currently required to subsidize cable television operations, and assert that the Commission has jurisdiction to adopt a retransmission consent requirement.

264. The program producers that addressed the retransmission

consent proposal were generally in favor of it. The Motion Picture Association of America incorporates NTIA's comments by reference. Tandem Productions, Inc. and T.A.T. Communications favor adoption of retransmission consent without grandfathering existing systems if the syndicated exclusivity rules are deleted. Tandem and T.A.T. argue that retransmission consent would afford recognition of the rights of program producers and provide them with adequate revenues to assure the continued availability and quality of program product.

265. Among the program distributors, the sports interests were particularly strong in urging the adoption of retransmission consent, arguing vigorously that it is necessary, legal, and workable. The Commissioner of Baseball and the National Football League state that the Commission failed to adequately consider the effects that elimination of the distant signal limitations would have on the supply of sports programming. It is argued that sports programming differs from other types of programming; therefore, the conclusions drawn in the *Economic Inquiry Report* are not valid as to sports programming. Baseball argues that, although the elimination of the distant signal rules and the advent of superstations will make programming generally available to more viewers, ultimately, they will deprive the American public of the amount of sports programming previously enjoyed. Importation of games into a home team's territory will threaten the latter's three sources of revenue: live gate, broadcast revenues, and "hometown fan loyalty." With unfettered importation of distant signals, Baseball fears that its weaker teams will be particularly hard hit. This would in turn result in a change in telecasting patterns, with local and regional telecasts decreasing. Baseball claims that to date technological and regulatory pressures have kept cable from saturating home teams' territories. Removal of the distant signal rules would, however, remove the "final safeguard" against the loss of large amounts of sports programming from conventional television. The National Basketball Association agrees with the thrust of these comments, but particularizes that it has two sources of revenue, its network broadcast revenues (the crucial source) and local telecasts, both of which would be jeopardized by the elimination of the distant signal rules without the imposition of retransmission consent. NBA notes that its network ratings have decreased and that the value of its programming to local stations will also decrease. NBA stresses that the potential impact on its games as network television attractions is, however, the biggest threat. The National Collegiate Athletic Association also favors retransmission consent as a means of safeguarding its college teams' live gate attendance, and it, like Baseball, NFL and NBA, argues that distant signal carriage of competing games will force colleges to forego broadcasts to avoid cable retransmission and thus decrease, rather than increase, the availability of college sports to the public. Baseball emphasizes that copyright compensation does not solve the sports interests' problems with unregulated distant signal

importation of competing games because the crucial issue for sports is control, not compensation. Madison Square Garden Communications Network suggests simply that retransmission consent be given consideration as a possible alternative to the present distant signal and syndicated exclusivity rules.

266. The sports interests also contend that the Commission has the requisite jurisdiction to adopt a retransmission consent proposal, at least with respect to sports, and that retransmission consent would be workable. Baseball and the NBA argue that the Copyright Revision Act does not bar Commission recognized retransmission consent as a communications rather than a copyright policy matter and, as did NTIA, also maintain that the legislative history of the Copyright Revision Act makes it clear that Congress did not intend to intrude on the Commission's prerogative to make communications policy. Baseball construes this prerogative to include the removal of any category of signals from the general compulsory licensing provisions. In any event, Baseball argues particularly that the legislative history of a predecessor bill to the Copyright Revision Act demonstrates that Congress specifically perceived cable carriage of sports programming to be a communications policy issue,[287] and that the sole reason Congress did not adopt legislation on the subject was that it thought the Commission would deal with the problem in the context of a pending rulemaking procedure.[288] Baseball also maintains that arguments that retransmission consent will not work are untenable. Baseball terms claims that broadcasters will not deal with cable systems "speculative," and argues that program suppliers, especially sports interests, will deal with cable.[289] Baseball argues that the 1968 retransmission consent experiment did not completely fail, and, given its circumscribed operation, could hardly have been expected to succeed. Although Baseball concedes that existing exclusivity contracts between broadcasters and program suppliers could inhibit cable operators' ability to secure retransmission consent, Baseball argues that this is a reason to phase in retransmission consent rather than reject it out of hand.

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[287] Baseball cites the following language from the Senate Judiciary Committee Report on S. 22:

> Without prejudice to the arguments advanced [in behalf of proposals to exclude in some circumstances the carriage of organized professional sporting events from the compulsory license] . . . these issues should be left to the rulemaking process of the Federal Communications Commission, or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce.

S. Rep. No. 94-473, 94th Cong., 1st Sess. 80 (1975).

[288] E.g., *Notice of Proposed Rulemaking in Docket 19417*, 36 FCC 2d 641 (1972).

[289] In support of this proposition, Baseball notes that it has already negotiated a game-of-the-week package with UA-Columbia Cablevision for presentation on pay cable. It also notes that many clubs, exemplified by the New York Yankees and Mets and the Philadelphia Phillies, have contracted with cable systems or programming packagers to cablecast a number of their non-televised games.

267. The United States Department of Justice and the United States Copyright Office have joined a number of individual cable television systems, cable television associations, common carriers, and WTBS-TV, Atlanta, in opposing Commission adoption of retransmission consent.

268. In contrast to the arguments of the proponents of retransmission consent, whose contentions stressed principally the necessity for its adoption, most of the opponents of retransmission consent urge as their principal argument the Commission's lack of jurisdiction to adopt a retransmission consent proposal subsequent to the adoption of the Copyright Revision Act. The foremost proponent of this view is the Department of Justice. The Department notes that Congress enjoys the prerogative of enacting patent and copyright legislation pursuant to Article I Sec. 8, Cl. 8 of the Constitution.[290] The Department states that Congress exercised that prerogative in 1976 in enacting the Copyright Revision Act, and in doing so it was fully aware of virtually all the arguments advanced by the proponents of retransmission consent. The Department argues that the legislative history of the Copyright Revision Act makes it clear that Congress intended the cable television industry to have a compulsory license to retransmit whatever broadcast signals the Commission's rules would allow, and that there is no credible evidence to suggest that Congress intended to allow the Commission to adopt the kind of retransmission consent proposal that the Congress itself had considered and rejected. The Department states that arguments of the proponents, that the royalties provided under the Act are inadequate and the system created too "regulatory," are properly addressed to, respectively, the Copyright Royalty Tribunal and the Congress, because the Commission's authority under the Communications Act does not extend to rewriting an Act of Congress. The comments of the Copyright Office also conclude that Congress established the compulsory license as the exclusive method for compensation of copyright owners and the Copyright Royalty Tribunal as the exclusive means whereby the rates may be adjusted.

269. A Congressional Research Service study on the Commission's jurisdiction to adopt retransmission consent rules also came to the same conclusion.[291]

270. Southern Satellite Systems, Superstation, Inc. (WTBS-TV, Atlanta), the Community Antenna Television Association, the Florida Cable Television Association, and A-R Telecommunications are among the other opponents of retransmission consent addressing the jurisdictional issue. They argue that Congress specifically declined to adopt a

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[290] This clause grants power to Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *U.S. Const.*, Art. I, sec. 8, cl. 8.

[291] Congressional Research Service, *FCC Jurisdiction to Require Retransmission Consent*, November 26, 1979.

retransmission consent requirement, terming it "unduly burdensome," and that the legislative history of the Copyright Revision Act indicates that in adopting the compulsory language Congress struck a conscious balance between the copyright owners' right to payment with the viewer's right to receive diverse sources of programming. The opponents argue that the structure of Section 111 of the Act, viewed as a whole, outlines a comprehensive congressional scheme assigning either full copyright liability, compulsory licensing, or outright exemption in differing circumstances, and specifying the procedures to be followed in obtaining a compulsory license, and therefore would allow no discretion to the Commission to effectively amend this complete statutory scheme by imposing a retransmission consent requirement in derogation of the compulsory license. Specifically, the commenters point to the legislative history of Section 801(b)(2)(B) of the Act for the proposition that Congress gave the Copyright Royalty Tribunal the authority to change the royalty fee only with respect to added signals, thereby underscoring the Congress' intent that Congress specifically recognized that the Commission could and indeed might change its distant signal rules but that the compulsory license *per se* could not be affected by amendment of the Commission's rules.[292] Florida Cable Television Association also notes that NTIA's "two-tiered" proposal of exempting certain systems from the retransmission consent requirement and allowing only these exempted systems to be governed by the compulsory license runs directly contrary to Section 111(C)(1) of the Act.[293] These parties contend that the Commission and the Congress have both consistently recognized that retransmission consent is primarily a copyright substitute rather than a matter of communications policy, and, as the proper body to act on an essentially copyright-related matter, Congress has consistently rejected it since 1960. The most recent evidence of this Congressional perception of retransmission consent as a copyright substitute was manifest in its rejection by

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[292] The cited language states that

> . . . the purpose of this provision is to give the Tribunal broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976. The present FCC rules limiting the number of distant signals that may be carried by cable systems have the effect of protecting copyright owners by restricting the amount of television broadcast programming retransmitted into distant markets. If these rules are changed in the future to allow additional carriage of television program it is the Committee's judgment that the royalty rates paid by cable systems should be adjusted to reflect such changes.

H.R. Rep. No. 94–1476, 94th Cong., 2d Sess. 176 (1976).

[293] Section 111(c)(1) of the Copyright Revision Act provides that cable carriage of secondary transmissions "shall be subject to compulsory licensing" upon compliance with certain terms and conditions set out in that Section.

the House and Senate Communications Subcommittees in recent Communications Act rewrite legislation.[294] As Southern Satellite Systems, Inc. argues, the Commission in 1968 recognized the copyright nature of retransmission consent in deferring to Congressional action on the cable/copyright question before adopting it.[295] Therefore, there can be no legal justification at all for imposing a retransmission consent requirement after Congress has adopted a revised copyright act that deals comprehensively with cable, Superstation, Inc. quoted testimony by Messrs. Valenti and Geller for the proposition that the instant retransmission consent proposal is simply a means of reopening the battle against cable's compulsory license before another inappropriate forum. Florida Cable Television Association and Southern Satellite Systems are among the parties who argue that retransmission consent could not come within the ambit of the Commission's "ancillary to broadcasting" jurisdiction over cable because it is designed primarily to protect the interests of the copyright owner rather than the broadcaster, and the Commission has no direct jurisdiction over program producers, how much they are paid and by whom. Moreover, to the extent retransmission consent is premised on protecting broadcasters, CATA notes that the *Economic Inquiry Report* has shown that broadcasters would not be harmed by deletion of the distant signal rules, and therefore imposition of retransmission consent would be an attempt to cure a problem that does not exist. Finally, several of the commenters note that the Commission indicated in the past that the element of "unfair competition," which its rules have been designed in varying degrees to remedy, would be remedied by Congressional adoption of a cable copyright scheme. In this regard they maintain that the compulsory copyright license adopted by Congress is not unfair in itself and concur with the Department of

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[294] See n. 282, *supra*.

[295] In its *Notice of Proposed Rulemaking and Inquiry in Docket 18397*, the Commission stated:

> While we believe that we must proceed to take appropriate steps to end the unfair competition aspect . . . we are also cognizant of other important developments which we should take into account. We refer specifically to important Congressional developments in the copyright field that bear directly on the issue of unfair competition . . .
>
> . . . As stated, we must take the above consideration into account. For, our retransmission consent proposal, while stemming from our responsibilities under the Communications Act . . . necessarily also embodies considerations like copyright in its practical applications . . . . Since Congress is considering the Copyright matter, we should afford the opportunity for Congressional resolution of the unfair competition aspect, as discussed. Such resolution would constitute the Congressional guidance sought in this important area.
>
> 15 FCC 417 at 432–33.

Justice that any claimed inadequacies were appropriately addressed to either the Congress or the Copyright Royalty Tribunal.

271. Superstation, Inc., directly addresses NTIA's arguments in support of the necessity of adopting a retransmission consent requirement. Superstation contends that NTIA's philosophical justification for its retransmission consent proposal, that cable and broadcasting are simply alternative ways of distributing television programming, is completely in error. Cable television and broadcast television are based on different economic principles, have different revenue sources, and operate in different marketplaces. Cable is a consumer product, sold at relatively low prices, and susceptible of being cancelled if it does not serve the interests of the customer. It draws its revenue directly from its subscribers. Broadcast television, on the other hand, is not "sold" at all, and derives its revenues from advertisers, many of whom would find no equally attractive alternative as an advertising outlet. Therefore, the marketplace bidding process that works for broadcast television will not work for cable television, and NTIA's "marketplace" solution is not viable. Because NTIA's "marketplace" is one which elevates the interests of copyright owners over consumers, Superstation argues that it is not responsive to consumer demands. Superstation notes that the public interest can sometimes only be served by a governmentally-induced balancing of the rights and equities of all involved, so that even if retransmission consent did obviate the need for extrinsic regulation, this fact standing alone does not prove that the public interest will be served thereby. Superstation also faults NTIA's tacit assumption that under a retransmission consent scheme copyright owners would exercise their marketplace control in a manner consistent with the public interest; Superstation terms this assumption "catastrophically unrealistic." Retransmission consent, Superstation maintains, involves not the right to fair competition, but the right to withhold program product to maximize profits. The NTIA proposal also ignores the key fact that the principal beneficiary of copyright is intended to be the public, not artists as a class, a philosophy the compulsory license embodies. Superstation sees as the "truly sinister" aspect of NTIA's retransmission consent proposal the fact that it would have the government bow out of regulating after deciding what television services the consumer should have, which is infinitely worse than continuing government regulation.

272. Other parties also treat aspects of the necessity for retransmission consent. The Arizona Cable Television Association maintains that a marketplace solution will result absent retransmission consent if the rules are abolished because, as in the case of programming supplied for network distribution, program suppliers will demand and get more revenue from superstations. Superstation concurs, stating that the present operation of WTBS-TV is evidence that retransmission consent is unnecessary. No program supplier is forced to sell to WTBS-TV; and when one does, the prices for programming reflect the station's

reception in distant cable homes. The Arizona Association also argues that even if either local stations or superstations are refused program product by some producers, the door would then be open for other programming by other producers. Finally, a number of the commenters, chief among them being the Copyright Office, note that it would be premature to judge that retransmission consent is necessary to remedy presumed inadequacies under the compulsory license system and the existing fee schedule. The compulsory license has been in existence for less than two years; nevertheless, the Copyright Royalty Tribunal's current royalty pool of $13,000,000 is almost 50 percent more than the amount Congress presumed the compulsory fee would garner. CATA further states that any comparison between the payment cable makes for programming under the compulsory license and the payment broadcasters make is simplistic, because cable television and broadcast television are two different businesses with two different sets of costs. Moreover, the Tribunal has not yet begun to disburse the fees, so it is impossible to judge whether the payments to producers will or will not prove adequate. Finally, it is argued that the Act provides a satisfactory mechanism for adjusting the fee, and its adequacy ought to be ascertained before a new payment scheme is superimposed.

273. Several of the commenters also spoke to the issue of the workability of a retransmission consent program. The Copyright Office states that the history of the growth of the cable industry, broadcasters' and copyright owners' response to it, and the impact of Commission regulation in the last ten years indicate that substituting retransmission consent for the compulsory license would result in "massive retransmission denials rather than consents." The Office cites the 1968 failed retransmission consent experiment and the unanimous opinion of cable, broadcast and program production interests in 1971 that retransmission consent simply would not work. The Office maintains that changes in the industry since 1968 have not been such as to make a difference. Most broadcasters would have no inducement to grant consents for retransmission of their own programming, and agreements between broadcasters and copyright owners are equally and in some cases even more restrictive on the ability of broadcasters to authorize retransmission than they were in 1968. Because "quitclaim" consents will not be sufficient, retransmission consent would unavoidably require cable systems to negotiate copyright licenses from individual copyright owners. Superstation notes that copyright owners would probably withhold consent because by doing so they could force major-market cable to effectively become all pay-cable, and pay cable would constitute a big second source of income, permitting them to maximize profits.

274. Superstation, Inc. states that retransmission consent is unworkable because an independent station in a major market can bid higher for program product than its counterpart cable system. Cable

cannot increase its subscription rates the way broadcasters can increase their rate cards to cover increased costs. Superstation cites the tremendous costs for off-network series[296] and the increased profitability of major-market UHF stations. Even if cable systems combined to purchase programming they could not out-bid major-market independent stations, with the result that the only programming cable might procure would be the less desirable programming that no broadcaster bid on. Superstation maintains that no cable company, even the largest multiple system operator, could spend the sums necessary to procure a single program series, because to do so systems would price themselves out of existence. It charges that NTIA has failed to explain how the emergency of satellites would be the factor that would make retransmission consent succeed. Satellites have not changed the structure of the cable industry in relation to the broadcast industry so as to make retransmission consent viable. Even WTBS-TV, which is received in 5,000,000 homes, could not compete with independent stations in major markets that reach many more homes.

275. Superstation maintains that the ultimate result of retransmission consent will be that cable in major markets will be pay cable, and this result would come from the dictates of the program suppliers rather than from cable consumers. Superstation further states that retransmission consent will not increase program supply, but instead will virtually guarantee that the networks and the major program suppliers will control the market and operate so as to maximize profits by limiting production. Superstation also notes that program suppliers would buy up cable systems that go out of business, and thereby obtain control over both product and distribution facilities.

276. Southern Satellite Systems contends that retransmission consent would terminate its resale carrier business and destroy satellite delivery of superstations. In this respect Southern Satellite notes that the satellite's advent will not make retransmission consent successful; on the contrary, the blacking out of portions of WTBS-TV's broadcast day as a result of retransmission consent would make satellite transmission impossible. This result would be particularly unfortunate in view of the fact that satellite transmission, by making available programming suited to a multitude of interests, will allow the consumer to escape the domination of the three networks, thus serving Communications Act purposes. Similarly, United Video, Inc. and the miscellaneous common carriers argue that retransmission consent would destroy their service because of the inability of cable systems to get consent for all of a station's programs. This would, of course, represent a serious loss of program diversity to cable subscribers generally, but the burden would fall most heavily on small,

[296] For example, Superstation cites the fact that in 1978 alone local television stations paid approximately $200,000,000 for syndicated programming.

independent cable systems that could not afford program-by-program negotiations.[297] Moreover, even if cable operators had some success, there would be no way technologically for the microwave common carriers to carry programs individually to systems obtaining checkerboard consents. The result, these commenters state, would be "an immediate end" to the microwave transmission of distant signals which has been an essential source of programming to the industry and the public for many years.

Discussion

277. Prior to passage of the Copyright Law Revision of 1976, cable retransmission of broadcast programs did not violate the copyright law, irrespective of whether the owner of the copyright, the originating broadcaster, or any other interested person in the distribution chain had granted its consent. See *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artist Television, Inc.*, 392 U.S. 390 (1968). The cable retransmission was not a "performance" and therefore did not constitute an infringement of the copyright. *Id.* The 1976 Act changed that. But in making the change, Congress enacted a regulatory scheme that is fundamentally inconsistent with NTIA's retransmission consent proposal.

278. Under Section 106[298] of the 1976 Copyright Act and the definitions in Section 101, it is clear that the owner of a program copyright has the exclusive right to authorize the transmission of that program to television audiences.[299] Section 106 also states, however, that the copyright owner's exclusive right is "[s]ubject to Sections 107 through 118." Section 501(a) establishes that anyone who violates "the exclusive rights of the copyright owner as provided by Sections 106 through 118 . . . is an infringer of the copyright." Thus, infringement can lie only where the exclusive rights are violated; and those rights are defined not only by Section 106 but also by other provisions such as Section 111.

279. Section 111(c) provides an explicit limitation on the program copyright owner's Section 106 exclusive rights and on his right to claim infringement under Section 501(a). Section 111(c)(1) says:

> Subject to the provisions of clauses (2), (3), and (4) of this subsection, secondary transmissions to the public by a cable system of a primary transmission made by a

[297] One author has suggested that "it would cost each CATV owner at least $33,000 a year in administrative expenses to properly clear copyrighted materials." Martin H. Seiden, *Cable Television U.S.A.*, Praeger Publisher, 1972, p. 111.

[298] The references to "section" at this point and hereafter are to Title 17 of the United States Code.

[299] Section 106 gives the copyright owner the exclusive right "to perform the copyrighted work publicly." Section 101 defines "perform . . . publicly" to include transmission and "transmit" to include broadcast and cable carriage of television programs. See also Section 111(f)'s definitions of "primary transmission" and "secondary transmission."

> broadcast station licensed by the Federal Communications Commission . . . and embodying a performance or display of a work *shall be subject to compulsory licensing* upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission. [Emphasis added.]

Section 111(d) explains that to quality for compulsory licensing, the cable system must provide a notice and any other requested information to the Copyright Office and deposit with the Register of Copyrights a statement of account and royalty fees calculated under a statutory formula (as adjusted from time to time by the Copyright Royalty Tribunal pursuant to Section 801(b)(2)).

280. Section 111(c)(2) makes it clear that the right to a compulsory license is unavailable (and an infringement action may be brought) if the cable system's willful or repeated carriage of the particular signal "is not permissible under the rules, regulations, or authorizations of the Federal Communications Commission" or the system failed to file the notice, statement of account, or royalty fee required by Section 111(d). Section 111(c)(3) adds that the right to a compulsory license (and the accompanying immunity from an infringement suit) is forfeited if the cable system willfully alters the commercial advertising or station announcements that accompany the broadcast of the copyrighted work.[300] Section 501(c) provides that the copyright-licensed local broadcaster, in addition to the copyright owner, has standing to sue the cable system for infringement where the cable system has failed to file the notice, statement of account, or royalty fee required by Section 111(d). If the cable system alters the primary transmission in a way forbidden by Section 111(c)(3), such as by deleting commercials, both the originating broadcaster and any local broadcaster in the area into which the cable system carries the signal, have standing to sue for infringement.

281. The foregoing regulatory scheme is inconsistent with the retransmission consent proposal in several respects. Section 111(c)(1) establishes that the cable system's retransmission of the copyrighted work "shall be subject to compulsory licensing upon compliance with" certain enumerated requirements. The copyright owner is expressly deprived of one of the usual incidents of copyright protection, i.e., the right to prevent copying or to condition copying on the payment of a royalty determined by the copyright owner. Instead, the permission to copy is "compulsory" and the "royalty" is established by Congress, subject to Copyright Royalty Tribunal adjustment. Under NTIA's proposal, the copyright owner could withhold from the originating broadcaster full authority to consent to the retransmission and, thus, reserve to the copyright owner the right to grant or deny consent. The

[300] Section 111(c)(4) imposes certain limits on the compulsory license which Section 111(c)(1) grants as to Canadian or Mexican broadcasts retransmitted by cable systems in the United States.

copyright owner could not (except perhaps in what NTIA describes as "warehousing" situations) be compelled to grant retransmission permission. In reality, the cable system would no longer have the "compulsory licens[e]," which Congress granted. The copyright owner and/or the broadcaster could extract a fee or fees in excess of the royalty set by statute, thus circumventing the plain language of Section 111(d). The distribution of such fees among claimants could vary dramatically from the division of royalties which the Tribunal would make. The consensual arrangements between copyright owner, broadcaster, and cable system would be governed by state contract law and not the substantially different Federal scheme in Section 501–510 which was carefully designed to govern copyright infringement suits and remedies.

282. There is nothing in the Committee reports accompanying the Copyright Revision Act that in any way suggests that the compulsory license was not intended to cover all cable systems or that the Copyright Royalty Tribunal was not meant to be the exclusive entity for adjusting cable copyright royalties. The House Judiciary Committee report states that "the Committee has determined to maintain the basic principle of the Senate bill [S. 22] to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC."[301] The House Conference Committee report stated that "The Senate Bill . . . created a compulsory license for any cable retransmission authorized by the Federal Communications Commission," and that the House bill retained the basic compulsory license scheme envisaged in the Senate bill.[302] With respect to the authority of the Copyright Royalty Tribunal to adjust copyright royalties, the House Judiciary Committee report clearly states that "Chapter 8 establishes a Copyright Royalty Commission for the purpose of periodically reviewing and adjusting statutory royalty rates for use of copyrighted materials pursuant to compulsory license provided in Section 111 (secondary transmissions by cable systems) . . ." and further that "cable and copyright owners agreed to a set of standards for the adjustment of rates which the Committee in large measure has accepted."[303]

283. We have given careful consideration to the comments relating to the retransmission consent proposal in light of this statutory scheme, with particular attention to the polarization of views between NTIA and the Department of Justice, the Copyright Office, and the Congressional Research Service. Based on our analysis of the law and the facts, we find that retransmission consent is a surrogate for full copyright liability and that, because full copyright liability was

[301] H. Rept. No. 94–1476, 94th Cong., 2d Sess., 89.
[302] H. Rept. No. 94–1733, 94th Cong., 2d Sess., 75.
[303] H. Rept. No. 94–1476, 94th Cong., 2d Sess., 173.

considered in detail and rejected by Congress in favor of the compulsory license system, adoption of retransmission consent rules is beyond the authority of the Commission.

284. In view of our findings relating to the effects of cable television, distant signal carriage on television broadcast service to the public, no appropriate evidential base and no sound policy predicate exists for the Commission to exercise its authority to adopt the retransmission consent proposal as a means of eliminating potentially destructive economic competition. In fact, neither NTIA nor the other supporters of the retransmission consent proposal generally urge it as a policy calculated to protect local television broadcast stations from the potential adverse consequences of cable television distant signal audience diversion. In *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968), the Supreme Court affirmed the Commission's regulatory authority over cable television, noting that "the Commission feared that CATV might, by dividing the available audiences and revenues, significantly magnify the characteristically serious financial difficulties of UHF and educational television broadcasters." (footnote omitted) It concluded, in light of this, that "there is substantial evidence that the Commission cannot 'discharge its overall responsibilities without authority over this important aspect of television service'"(citations omitted). The function of the retransmission consent proposal, at least as it is articulated by NTIA, relates not at all to these considerations that were before the Supreme Court when it affirmed our regulatory authority in the cable television field. Thus, since specific authority to adopt the proposal is not found in the Communications Act and existing precedents are inapplicable, a new theoretical justification would be required if Commission jurisdiction to adopt rules of this type were to be found.

285. We find no such justification here. NTIA cites Sections 325(a), 303(g), (h), and (s) and 307(b) of the Communications Act as authority for the adoption of the rules it proposes.[304] Section 325 is inapplicable

[304] Section 325(a) states in relevant part:

> . . . nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station.

Section 303(g) provides the Commission authority to:

> Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

Section 303(h) provides that the Commission shall:

> Have authority to establish areas or zones to be served by any station;

Section 303(s) provides that the Commission shall:

> Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all

to cable television signal carriage directly for, as the Supreme Court has stated, "CATV systems do not in fact broadcast or rebroadcast."[305] Nor do we find such authority within the other cited sections or within some authority ancillary to our regulatory responsibilities under the cited sections. The retransmission consent proposal, while it would, according to its proponents, more efficiently and equitably order the markets in which cable television system operators obtain television broadcast signals, would not and is not intended to create zones to be served by particular stations or serve to allocate stations or service equitably among the several states and communities.

286. More specifically, we find no "ancillary" authority broad enough to impose retransmission consent rules on cable television systems. As developed by the courts, Section 2(a) of the Communications Act; 47 U.S.C. §152(a), "confer[s] on the Commission a circumscribed range of power to regulate cable television . . . ." *FCC v. Midwest Video Corp. (Midwest II)*, 440 U.S. 689, 696, (1979). One formulation the courts have used to describe the outerbounds of that regulatory power is the statement that the cable regulations must be "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 691, quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). Those "responsibilities," of course, are set out in various provisions of the Communications Act and have been amplified in court and Commission decisions.

287. In *Southwestern Cable, supra*, the Supreme Court held "the Commission has reasonably concluded that regulatory authority over CATV is imperative if it is to perform with appropriate effectiveness" its responsibilities under Sections 303(f) and (h) and 307(b) to create "an appropriate system of local broadcasting." 392 U.S. at 174. The Court noted the Commission's Congressionally-endorsed finding that this statutory objective had "two subsidiary goals," wider use of UHF channels and encouragement of educational broadcasting. *Id.* at 174–75. The Court said "[t]he Commission has reasonably found that the achievement of each of these purposes is 'placed in jeopardy by the unregulated explosive growth of CATV' " *Id.* at 175. The Court

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frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

Section 307(b) provides that:

> In considering applications for licensees, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair efficient, and equitable distribution of radio services to each of the same.

[305] *Fortnightly Corporation v. United Artists Television*, 392 U.S. 390 (1968). *See also, Report and Order on CATV and TV Repeater Services*, 26 FCC 403, 429–430 (1959).

stressed both Congressional and Commission findings that, given the then-current state of evidence, uncontrolled distant signal importation, by "dividing the available audiences and revenues," might eliminate local broadcasting service or, at least, discourage UHF and educational television development. *Id.* at 176. *Southwestern Cable*, therefore, stands for the proposition that cable's *adverse* impact on the achievement of broadcast goals may support Commission ancillary jurisdiction over cable.

288. In *United States v. Midwest Video Corp. (Midwest I)*, 406 U.S. 649 (1972), the Supreme Court explored another aspect of the Commission's regulatory authority over cable. In upholding the requirement that cable companies originate some programming, a 4-member plurality of the Court said that the reasonably ancillary doctrine also encompassed affirmative efforts to further statutory policies, not just negative avoidance of adverse effects as exemplified in *Southwestern Cable*. 406 U.S. at 664. The plurality said that the Commission had "authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting." *Id.* at 667. The particular statutory objectives involved in *Midwest I* were the goals of outlet and program diversity which the plurality traced to Sections 303(g) and 307(b) of the Act. *Id.* at 667-68.

289. The crucial concurrence in the *Midwest I* result by the Chief Justice, however, did not give any broad endorsement to the plurality's expansion of the ancillary jurisdiction doctrine. He cautioned that the program origination rule "strains the outer limits" of the Commission's jurisdiction. *Id.* at 676. He urged Congress to comprehensively reexamine the statute as it relates to cable television. *Id.* at 676. The Chief Justice did observe that "when they [i.e., cable operators] interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission." *Id.* at 676. He did not, however, explain how far his signal interruption rationale could be extended to give the Commission jurisdiction to affirmatively achieve traditional broadcast-related regulatory goals.

290. *Midwest II*, *supra*, did not resolve how far a majority of the Supreme Court would be willing to extend the *Midwest I* plurality's view of the reasonably ancillary doctrine. The Court in *Midwest II* invalidated the Commission's cable access and capacity rules, despite their affirmative promotion of the established broadcast regulatory goals of maximizing outlets for local expression and programming diversification. The Court held that the Commission's cable television jurisdiction necessarily must be limited by "reference to the provisions of the Act directly governing broadcasting . . . ." 440 U.S. at 706. Since Sections 3(h) and 326 evidenced a Congressional reluctance to impose a non-discriminatory access requirement on broadcasters, the Court implied a similar limitation as to cable television operators. While it may not have been necessary to the result, the 6-member majority in

Midwest II did appear to accept as a general proposition what it characterized as "[o]ur holding in *Midwest [I]* sustain[ing] the Commission's authority to regulate cable television with a purpose affirmatively to promote goals pursued in the regulation of television broadcasting. . . ." 440 U.S. at 700.

291. Those parties urging the Commission to promulgate retransmission consent regulations identify Sections 303(h), (h), and (s), 307(b), and 325(a) as setting forth statutory policies that such regulations would affirmatively promote. They claim that under *Southwestern Cable*, as extended in *Midwest I* and *II*, the Commission has ancillary jurisdiction to regulate cable to promote those objectives.

292. As indicated in greater detail below, we believe that the transplantation of the requirements of Section 325(a) of the Communications Act into the field of cable television under a concept of regulation "reasonably ancillary" to our regulation of broadcasting would be fundamentally inconsistent with the recently adopted 1976 Copyright Act. There is no need to protect the functioning of Section 325 by creating a Commission rule paralleling the statutory requirement for television broadcasters because the Congress has protected those interests deemed to warrant protection by the adoption of the Copyright Act. We note, as discussed below, that Congress has specifically refused to adopt amendments to the Communications Act necessary to extend Section 325 to cable television. Its stated reason for rejecting those proposed amendments was that, in so doing, it would be determining questions as to the property rights in broadcast programs and that this determination was appropriately left for resolution in connection with changes in the copyright law.

293. Nor do we find authority under the "reasonably ancillary" doctrine in Section 303(h). That Section grants the Commission "authority to establish areas or zones to be served by any station." The most obvious purpose of this provision is, in conjunction with Sections 303(c)-(f), to guard against service-impairing electronic interference between stations. In addition, Section 303(h) works in conjunction with Section 307(b) to ensure the fair allocation of local broadcast service among communities. See *Southwestern Cable*, 392 U.S.at 174. That case establishes that the Commission, under the "reasonably ancillary" doctrine may regulate to prevent deleterious impact to local broadcast service. Such regulation entails use of the negative, impact-avoidance arm of the ancillary jurisdiction doctrine; and it requires substantial record support before such regulation of cable can be justified. It is difficult to comprehend, however, how Section 303(h) can provide an *affirmative* purpose of the *Midwest I* genre to justify retransmission consent regulations. Section 303(h) empowers *the Commission* to establish areas or zones of service. NTIA's retransmission consent

proposal would empower *the broadcaster* to expand or retain the area or zone of service reached by programming.[306]

294. Section 303(a) empowers the Commission to "generally encourage the larger and more effectuve use of radio." Section 303(s) authorizes the Commission to promote UHF development. Section 307(b) requires "fair, efficient, and equitable distribution of radio service" among the states and communities. These provisions all demonstrate the importance of creating and preserving viable local service. Insofar as a retransmission consent requirement is necessary in that endeavor, the foregoing provisions provide the requisite statutory objectives for invocation of the "reasonably ancillary" doctrine. But in order to justify regulation under the "reasonably ancillary" doctrine, it is necessary to invoke more than a relevant statutory purpose. It is necessary to demonstrate a real factual nexus between the proposed regulation and that relevant statutory purpose. As this *Report and Order* demonstrates, the factual predicate or nexus is lacking. The unrestricted importation of distant non-network programming does not substantially threaten the viability of local broadcast service. This absence of likely harm, therefore, is fatal to any contention that the Commission has ancillary jurisdiction to impose a retransmission consent requirement.

295. In *Southwestern Cable*, 392 U.S. at 176–77, the Supreme Court noted that, on the then-existing state of knowledge, the deleterious consequences to local broadcast service could only be estimated. The Court was satisfied that there was "substantial evidence" of the need for regulation. *Id.* at 177. Plainly, the Court was impressed with Congressional committee and staff reports reflecting the urgency of the problem. The word "imperative" appears several times in the Court's opinion. *Id.* at 177. See also *Midwest II*, 440 U.S.at 706. On the current rulemaking record, however, after years of actual experience with cable and extensive economic analysis of that experience, the urgency and necessity for regulation are lacking. What was "imperative" in 1968 is no longer demonstrably so.

296. *Home Box Office, Inc. v. FCC*, 567 F. 2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977), sharply illustrates that mere intuition or speculation or inadequately established factual predicates will not suffice to support an attempted exercise of "reasonably ancillary" jurisdiction over cable television. There the U.S. Court of Appeals for

[306] The supporters of retransmission consent also seem to rely on Section 308(a). Section 308(a) says the Commission may grant permits and licenses "only upon written application therefore received by it." This provision serves the obvious purpose of guaranteeing, along with Section 308(b) and Sectoin 309, that the licensing process is open and public. The quoted words of Section 308(a) hardly reflect a Congressional purpose of ensuring that a broadcaster's signal is kept within limited geographical confines unless and until he consents to distant carriage by cable. The provision, therefore, is not a basis for imposing retransmission consent regulations under the "reasonably ancillary" doctrine.

the District of Columbia Circuit overturned the Commission's pay cable anti-siphoning rules. The effect of those rules was "to restrict sharply the ability of cablecasters to present feature film and sports programs" as part of the cablecasters' pay service (as distinct from basic retransmission service). 567 F. 2d at 19. The Commission there did not attempt to justify its rules on the *Southwestern Cable* theory that pay cable programming would fragment audiences and undercut the financial viability of conventional local broadcast service. 567 F. 2d at 29. The Commission did contend, however, that the rules were within the Commission's jurisdiction to ensure nationwide broadcast service under Section 1, 47 U.S.C. §151. The theory was that cable itself would not be a nationwide service in the near future, but would outbid broadcasters for programming in markets where cable/broadcast competition for program supply did exist, and that this "could result in loss of broadcast television service to regions not served by cable." *Id.* at 33. The Court found this theory "unsupported in the record" and held that "the postulated loss of regional service is too speculative to support jurisdiction." *Id.* at 33.[307] In other words, the Commission's attempt to ground ancillary jurisdiction on a perceived need to protect the supply of programming to broadcasters was rejected by the Court because "the Commission has not established its jurisdiction on the record evidence before it." *Id.* at 34.

297. The *Home Box Office* court went on to explain why the anti-siphoning rules could not be affirmed under the Administrative Procedure Act, irrespective of the jurisdictional issue. The court set out as a basic ground rule that "regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist." 567 F. 2d at 36. After examining the rulemaking record, the court concluded that the Commission did not have sufficient evidence that a problem did exist. The Commission had "failed to crystallize what is in fact harmful about 'siphoning.' " Moreover, the Commission was unable to identify "any comments in a voluminous record which would support its statement" that "siphoning is 'real, not imagined.' " *Id.* at 37. Indeed, the Commission had admitted it lacked a "clear picture as to the effects of subscription [including pay cable] television upon conventional broadcasting." *Id.* at 37. The court said that "if there is any evidentiary support at all, it is indeed scanty." *Id.* at 37. Nine months before the Commission promulgated its first anti-siphoning rules, the Commission justified declining to issue such rules because it lacked adequate information and needed further experience. *Id.* at 22, 37 n. 60. The court said the "Commission has not called our attention to any data which would fill the gaps in its experience identified" at the earlier time. *Id.* at 37 n. 60. The court

[307] The Court also rejected as unsupported two other jurisdictional bases urged by the Commission, preservation of "the overall level of public enjoyment of television entertainment" and promotion of diversity. 567 F. 2d at 162, 167.

criticized the Commission's "choice to regulate rather than allow a period of unregulated experimentation in which data could be generated that could form a predicate for informed agency action." *Id.*[308] The court added:

> In this state of affairs, where there is no evidence of any urgent need for preventive action and where approval of the Commission's position would foreclose the possibility that data could be generated in the future that could allow fully informed decisionmaking, we are disinclined to give the Commission the "benefit of the doubt" which it argues it should have. *[Id.]*

The court went on to explain that the factual record to support the regulations as pro-competitive was incomplete and that the "Commission has not documented its case" regarding the need for the rules to prevent loss of television service to the poor and to rural areas. *Id.* at 39.

298. In the present case, the rulemaking record refutes the conjecture that cable importation of distant syndicated programs will undercut any of the Commission's broadcasting regulatory goals.[309]

299. More important, however, than our inability to find authority

[308] *Accord, Home Box Office, Inc. v. FCC*, 587 F. 2d 1248, 1256 (D.C. 1978) (affirming Commission decision not to regulate program exclusivity agreements between suppliers and broadcasters).

[309] The proponents of retransmission consent say that the Commission is obliged under *Melody Music Inc. v. FCC*, 345 F. 2d 730, 733 (D.C. Cir. 1965) to explain why broadcasters seeking to rebroadcast programming must obtain the originating broadcaster's prior consent, whereas cable operators do not have to seek such consent for cable retransmissions of broadcast programming. *Melody Music* has no application to the jurisdictional question here and can not be used to salvage a jurisdictional argument that is otherwise unavailing. *Melody Music* requires equal treatment, or a reasoned explanation of differential treatment of similarly situated *broadcasters*. In any event, the simple explanation for the differential treatment here is that Congress imposed Section 325(a) on broadcasters and did not impose a comparable obligation on cable operators, nor did Congress give the Commission sufficient implied (i.e., ancillary) jurisdiction to impose such an obligation. *Melody Music* obviously does not control the actions of Congress. In any event the Supreme Court stated in *Fortnightly Corporation v. United Artists Television*, 392 U.S. 390, 400–401 (1968) and reiterated in *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974) that:

> The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry. (footnotes omitted)

While it might be argued that these are distinctions of relevance only under the copyright law, these decisions (and the 1976 Copyright Revision Act) are the explanation for the different positions of the cable and broadcast television industries in the program supply markets for which NTIA seems to be seeking an explanation.

for the Commission to adopt this proposal under established precedents, is our inability to distinguish its policy thrust from purely copyright matters with respect to which Congress has chosen a different course. A review of both the historical record and the present debate, make clear the virtual identity of the two issues, both of which relate to the allocation of property rights in television programming and the legal position of the cable television industry in the broadcast television programming supply market.

300. As we indicated in our *Notice of Proposed Rule Making*, para. 89, the initial consideration of this proposal focused on whether Section 325(a)[310] should be amended to apply to cable television systems. Section 325(a) of the Communications Act requires broadcasters that rebroadcast the signals of other stations to obtain the permission of those stations. Its function is "to protect the rights of those having property rights in programs."[311] When the issue of whether Section 325(a) should be applied to cable television operations came before the Commission, we stated:

> It may well be that Congress would desire to protect the property right of a broadcaster as against CATV retransmission as well as against rebroadcasting. For this reason, as well as because of the competitive impact involved here, we intend to recommend to Congress that an appropriate amendment to Section 325(a) be enacted . . . . • • • By other broadcasters . . . we are asked to recognize the existence of a propriety right, and to affirm it by rules; then, it is said, we would be in a position to issue 'cease and desist orders' against any CATV system rebroadcasting a signal without permission. This course of action we do not believe appropriate. This is not the forum in which the existence or nonexistence of a private property right can be adjudicated . . . ."[312]

301. This legislative proposal was made to the Congress and was rejected by both the Senate and House Committees with responsibility for its consideration. The report of the House Committee stated:

> The Committee has considered the question raised by the Commission on its legislative recommendation of whether Section 325 of the Communications Act should be amended so as to prohibit transmission by CATV systems of any broadcast signals except with the express authority of the broadcast stations. In view of the pendency of copyright legislation, it is the view of the Committee that the recognition and protection of any property rights in programs broadcast by radio and television stations should more appropriately be determined within the framework of copyright legislation rather than within the framework of communications legislation. Therefore, the Committee decides against amending Section 325 . . . .[313]

302. We considered the subject of retransmission consent again in the *First Report and Order in Dockets 14895 and 15233*, 38 FCC 683

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[310] *Supra*, n. 304.

[311] *Report on Amendment of Rebroadcasting Rules*, 1 R.R. (Pt. 3) 91:1131. at 91:1134, May 15, 1952.

[312] *Report and Order in Docket 12433*, 26 FCC 2d 403, 430 (1959).

[313] *Report of the House Committee on Interstate and Foreign Commerce on H.R. 13286*, H.R. Rep. No. 89-1635, 89th Cong., 2d Sess. at 11 (1966).

(1965). There, we were requested to "construe the microwave carriage and distribution of signals by or for the benefit of CATV's as a single transaction which, in effect, constitutes 'rebroadcasting' under the existing provision of Sec. 325." *Id.* at 706 n. 37. We stated, however, that "the proposed construction is a strained one, which we are not at liberty to adopt." *Id.* In that *Report*, we recognized that cable television "stands outside of the program distribution process" and that, therefore, "the usual competitive situation" is not present. Nevertheless, we reiterated that cable television had not been found subject to the requirements of Section 325 and that Congress had not seen fit to adopt our recommendation that "restrictions on rebroadcasting embodied in Section 325 of the Communications Act should be extended to the distribution of broadcast signals by CATV's." *Id.*

303. The *Second Report and Order in Docket 14895, 15233, and 15971*, 2 FCC 2d 725 (1966) also addressed the question of retransmission consent. We stated:

> As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of Section 325(a) to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program marketplace.

Id. at 748. We also pointed out the "anomalies which result" from the situation in which broadcasters must negotiate for programming whereas cable systems do not and expressed our concern over how this could affect the economic base of a television station serving as an outlet for local expression for all the people in its service area. *Id.* at 778–781. We concluded, as we had earlier in Docket 12433, that we should urge Congress to consider whether a provision similar to Section 325(a) should be made applicable to cable television including whether, to what extent, and under what circumstances cable systems should be required to obtain the consent of the originating broadcast station. In suggesting this approach, we observed:

> We are not in a position to state whether a Section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting Congressional (and Commission) consideration, including such aspects as how a 'retransmission consent' requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

Id. at 788.

304. The Commission again considered the matter in connection with its *Notice of Proposed Rule Making and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417 (1968), in which the Commission itself proposed to apply such a requirement to the carriage of distant commercial stations on cable television systems in the 100 largest television markets and to those signals carried by cable systems in the smaller markets that were necessary to provide subscribers with

signals beyond the three national television networks and one independent station. *Id.* at para. 39.

305. In making this proposal the Commission indicated that it would forebear acting until the Congress had an opportunity to act on pending copyright legislation which it was hoped would resolve the unfair competition aspect of the retransmission consent proposal and provide "the legislative guideline which the Commission has long sought . . . ." *Id.* at para. 39. As the Commission noted, the retransmission proposal "necessarily also embodies considerations like copyright in its practical applications." *Id.* at para. 40.

306. After considering the various comments filed relating to this proposal and having undertaken some limited experimentation with operation under it, the Commission rejected it stating "experience has indicated that it will simply not achieve our basic objectives."[314]

307. In putting forth its retransmission consent proposal in 1968 the Commission stated that cable competed "unfairly" with broadcasters "because CATV presently stands outside the competitive program distribution market,"[315] and that retransmission consent was designed to eliminate this element of unfair competition "through direct application of market forces now operative as to analogous services."[316] During the course of Senate oversight hearings several months after issuance of the retransmission consent proposal, the Commission elaborated further on the ropyright nature of retransmission consent. At one point in the hearings, Subcommittee Chairman MacDonald asked then-Commission Chairman Hyde whether retransmission consent is not "in essence copyright." Chairman Hyde responded that, "In operation it could have many of the characteristics of copyright, that is true."[317] Chairman MacDonald pressed further on the exact nature of retransmission consent:

> Chairman MacDonald. Would it not be fair to say that retransmission consent has to be obtained from the copyright owner?
>
> Chairman Hyde. I am certain that once this approach went into operation that the copyright owners would see to it in the arrangements they make with stations or networks that they reserved the rights to make separate arrangements with CATV, and it would bring CATV into the program market in a copyright sense, yes it would . . . what we have proposed is essentially a plan under which CATV systems would get access to programs in the same manner as conventional television for exhibition in the top 100 markets . . .[318]

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[314] *Cable Television Report and Order*, 36 FCC 2d 143, 165 (1972).

[315] *Notice of Proposed Rulemaking and Inquiry in Docket 18397, supra*, at 430. It should be noted that the Commission's 1968 proposal was the same as NTIA's in that it nominally would have required the cable operator to secure consent from the broadcaster rather than the copyright owner.

[316] *Id.* at 432.

[317] Hearings on FCC oversight before the House Subcommittee on Communications and Power, 91st Cong., 2d Sess., Serial No. 91-1, 59-60 (1969).

[318] *Id.* at 60-61.

308. A contemporary expert participant in the ongoing cable/copyright controversy in the Congress, then-Deputy Register of Copyrights George D. Cary, remarked:

> When the Commission requires the CATV system to get the permission of the imported stations before it can bring these distant signals into a major market, it seems to me that this is a device for indirectly dealing with the copyright question, because as most everybody knows, radio stations do not generally own the proprietary right in the majority of the material which they broadcast, so in effect, this means that the CATV owner must deal directly with the copyright proprietor. This conclusion is made crystal clear in the clarification of this order which the Commission issued on the 24th day of January 1969, in which it said that a quit claim type of waiver from stations was not sufficient. The CATV system is going to have to get permission from the station on a program-by-program basis to import these distant signals, which obviously means they have got to get a clearance on the usage of the copyrighted material.[319]

309. In recent hearings on copyright revision before the House Judiciary Subcommittee, the Register of Copyrights gave her assessment of the nature of retransmission consent. Noting that after legislative and judicial failure to control the copyright problem in 1967 and 1968

> the FCC approached the problem directly through a regulatory device that was, in reality, the exact equivalent of a copyright. Immediately after the Supreme Court decision in *Fortnightly* the FCC imposed upon CATV the requirement of 'retransmission consent . . . ' [O]nly a few 'retransmission consents' (i.e., copyright licenses) were granted . . .[320]

With specific reference to the NTIA retransmission consent proposal, the Register of Copyrights has testified that

> It isn't just consent from the broadcasters, the broadcaster can't give consent unless it has authority to do so from the copyright owners. It has to have a contractual right to give that consent. So in effect you are creating a copyright. If you do, however you call it, whoever does it, it is still a copyright . . .[321]

310. Perhaps the most conclusive statements on the nature of retransmission consent, however, come from NTIA's Assistant Secre-

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[319] *CATV-The Fortnightly Postlude*, 16 Bull. Copyright Soc. 157, 162 (February 1969). Cary also notes that the retransmission proposal provoked a letter from Senate Judiciary Subcommittee Chairman McClellan to Chairman Hyde stating that ". . . there is a serious question concerning the jurisdiction of the Commission to impose what amounts to a requirement of copyright clearance . . . ," requesting the Commission's clarification of what its future regulation of cable would be "if legislation is enacted providing for the payment of reasonable copyright fees by CATV systems, . . ." and cautioning that if a response were not forthcoming, ". . . the subcommittee would have no other alternative than to schedule a public hearing to review those aspects of the Commission's action which involve matters coming within the jurisdiction of this Subcommittee." *Id.* at 165.

[320] Hearings on Copyright Revision Before the Subcommittee on Courts, Civil Liberties, and Administration of Justice, of the House Committee on the Judiciary, 96th Cong., 1st Sess., tr. 18 (November 15, 1979) (hereinafter, "1979 Copyright Hearings").

[321] 1979 Copyright Hearings, *id.*, tr. 41.

tary for Communications and Information, Mr. Henry Geller. In testimony before the House Communications Subcommittee, Mr. Geller adverted to the NTIA retransmission consent proposal and stated that ". . . it was always the copyright owner that was the key. The only way the station could give consent is if it bargained and obtained that from the copyright owner. Even if you go to the station and ask for retransmission consent, the only way he can give it is to go back to the copyright owner . . . ."[322] In further testimony before the Senate Communications Subcommittee Mr. Geller expressed the same thought[323] and in response Chairman Hollings, ranking minority member Senator Goldwater, and Senator Cannon, identified retransmission consent as a copyright matter rather than a matter of communications policy.[324] The retransmission consent provision in H.R. 3333 was deleted. During the 1979 Copyright Hearings Subcommittee Chairman Kastenmeier made reference to H.R. 3333's retransmission consent provision:

> Earlier this year our sister House Subcommittee . . . considered legislation which would have deregulated the cable industry but at the same time imposed the equivalent of full copyright liability—retransmission consent—on cable television systems.[325]

In propounding the NTIA retransmission consent proposal to the Subcommittee, Mr. Geller testified that, "We think that the sound policy for cable's future growth, not for its past but its future, is either

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[322] Hearings on H.R. 3333 Before the Subcommittee on Communications of the House Interstate and Foreign Commerce Committee, tr. 38, 40. This would appear to have brought Mr. Geller into agreement with Ms. Ringer who, in her formal statement, termed retransmission consent "the exact equivalent of a copyright." *Id.* at 33.

[323] Mr. Geller stated that program consent and retransmission consent were one in the same: ". . . in order to give retransmission consent, the station has to obtain that consent from the copyright owner. So whether you call it program consent or retransmission [consent], either one, the key is the copyright owner." Hearings on S. 611 and S. 622 before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 1st Sess., Serial No. 96-45, at 2112.

[324] Chairman Hollings stated, with respect to retransmission consent, that ". . . what's fundamentally involved . . . is whether we have a communications problem or whether we have an industry economic matter and I think that's really what copyright is." Senator Cannon stated ". . . this is an economic problem, and not a communications problem. The whole issue here seems to be how you are going to divide up that pie. And it really isn't a communications problem at all." Chairman Hollings further stated:

> . . . with respect to the retransmission consent matter, the FCC made a study of cable and found no harm was caused by unrestricted cable signal importation. Of course, that is communications policy. On the other hand, the Copyright Act said that every cable operator should have a compulsory license and pay a fee. Now, that is copyright policy.

Id. at 2869.

[325] 1979 Copyright Hearings, *supra*, n. 314, tr. 4, emphasis added.

retransmission consent as part of Communications Act policy, or full copyright liability, if it is a matter to be considered by this Committee."[326] Chairman Kastenmeier asked a clarifying question:

> Chairman. Your main recommendation appears to be that we should subject all future growth of cable to full copyright liability or the equivalent thereof while grandfathering existing service?
>
> Mr. Geller. Yes, sir . . .[327]

311. Not only were the two issues commonly perceived to differ in name only but the legislative history of the cable copyright controversy generally, and particularly the legislative history of the Copyright Revision Act, demonstrate that Congress specifically considered the full copyright liability (retransmission consent) proposal and decided to avoid imposing on cable any copyright scheme that would require negotiations for programming on a program-by-program basis. The difficulties associated with full copyright liability were noted as early as 1965.[328] In 1969, House Subcommittee Chairman Kastenmeier noted that the process of copyright revision would continue to involve the accommodation of the legitimate interests of those who sought compensation for use of their product with the equally legitimate interests of others who need to use that product without "undue complication or cost."[329] As the Register of Copyrights subsequently stated, the fundamental principle of the Copyright Revision Act, and indeed of all copyright legislation from 1974 on, was that cable's

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[326] *Id.* at 9.

[327] *Id.*, *And see* Mr. Geller's statement, *id.* at 9–10,

> ". . . we are saying that when you do deal with non-network programming, which is not sold on a simultaneous basis, it is sold to particular markets, and on an exclusive basis. If the broadcaster obtains that exclusivity in the marketplace, it is there we would go to the full copyright liability or retransmission consent. They are equivalent."

[328] See Hearings on H.R. 4347, 5680, 6831 and 6835, 1st. Sess., 1965, before Subcommittee No. 3 of the House Judiciary Committee, Serial No. 8, 89th Cong. This legislation, which was the first to treat the cable copyright issue, would have imposed full copyright liability on cable systems. The then-Register of Copyright Abraham Kamenstein noted that a supplementary report prepared by the Copyright Office on cable copyright liability concluded that although the copyright owner should be compensated for use of his works by cable systems, the practical difficulties of advance clearances had to be recognized. *Id.* at 1862. The following year the House considered a second cable copyright scheme which would have allocated copyright liability depending on the market served; it also had "trigger" provisions whereby systems, on performance of certain acts, would incur full copyright liability. The committee report explained this differential treatment: "neither the full liability sought by the copyright interests nor the complete exemption sought by the community antenna interests would be appropriate or fair." H. Rept. No. 2237, 89th Cong. 2d Sess., 80 (1966).

[329] Kastenmeier, "Copyright Revision Revisited." *Bull. Copyright Soc.* 16 (June 1969), 269.

retransmission activity should be subject to compulsory licensing with statutorily-prescribed royalties.[330]

312. The legislative history of the Copyright Revision Act plainly demonstrates that full copyright liability was specifically explored and specifically rejected by the Congress. In hearings before the House Subcommittee on H.R. 2233, testimony on the problems of full copyright liability and the preferability of compulsory licensing were expressed by both government and industry witnesses.[331] This testimony led Chairman Kastenmeier to remark at one point that the business of getting clearances and knowing what levels of rights are really being accorded may get extraordinarily difficult, particularly for users.[332] In another exchange, Committee member Herman Badillo asked Rex Bradley, then-president of the National Cable Television Association, why the Congress should establish a compulsory licensee fee for cable, instead of "[leaving] it to normal market forces to say what the payment should be?" Bradley responded by stating that, "We would like to avoid the possibility of having an unknown amount established without real control by us . . . ," and noted that there is no "moderating effect of the marketplace" or "competitive forces that would keep rates reasonable."[333] Congressman Badillo further pressed his question with witnesses urging greater copyright liability, exemplified in this exchange with MPAA President Jack Valenti:

> Mr. Badillo. Yesterday, when the cable television people were here they said that it is impossible to leave the question of the fee to the normal function of the marketplace because the nature of the transmission business is such that the cable people would really be in an impossible bargaining situation. What is your reaction to that claim? Would it be possible for us merely to say that it is a copyright and then leave the question of the amount to be paid to be settled in the marketplace?
>
> Mr. Valenti. I would have to tell you that I think there would be administrative difficulties in the free play of the marketplace. That is what the compulsory license was created to avoid, such an administrative difficulty; a compulsory license covering all signals, lessening the paperwork, lessening everything.[334]

313. The Committee report accompanying the Copyright Revision Act leaves no doubt that the Congress considered the very matters that are now being argued to the Commission and that it adopted the compulsory license instead of full copyright liability:

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[330] Senate Communications Act rewrite hearings, *supra*, n. 317, at 3335.

[331] Among the government witnesses testifying were the Register of Copyrights and Mr. Keller, General Counsel of the Office of Telecommunications Policy. Both endorsed the compulsory license, with Mr. Keller emphasing that it would afford fair compensation to the program producers while allowing cable to "grow and develop in response to the needs and demands of the public," and providing "stability and certainty where previously there had been none." 1974 Copyright revision hearings, at 109–116; 448–457 (1974).

[332] *Id.* at 115.

[333] *Id.* at 497.

[334] *Id.* at n. 2, 758.

> . . . The Committee recognizes that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined . . . to establish a compulsory license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.[335]

314. In this compromise—between the two extremes of no copyright protection (as existed prior to 1976) and full copyright protection—Congress struck what it found to be a fair balance between the rights of copyright owners and copyright users in order to advance the paramount rights of the viewing public. Viewed in this perspective, NTIA's retransmission consent proposal, with its admitted aim of making the rights of the copyright owner paramount, is not only a copyright surrogate that is beyond our jurisdiction to adopt but also is patently inconsistent with the Congressional intent because it would "skew" the balance of interests carefully and explicitly struck by the Congress.[336]

315. Notwithstanding this compelling evidence that Congress explicitly rejected full copyright liability in favor of a compulsory licensing and government-set royalties, the supporters of NTIA's retransmission consent proposal argue that Congress in 1976 specifically reserved to the Commission full authority to make "communications policy" and that this reservation includes the impact on "copyright policy." They cite the House Judiciary Committee's statement that

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[335] H. Rept. No. 74-1476, 94th Cong., 2d Sess., 8-9. *See also* the analysis of the rationale underlying the adoption of compulsory copyright licensing for cable television presented in the additional concurring views of Congressman Danielson, *id.* at 359-62. *And see* 2 Nimmer, Copyright, §8.18[E], citing the Committee Report and stating that, "The compromise solution was to adopt in section III a compulsory license system whereby the cable operators are not required to obtain the consent of the copyright owners, nor to negotiate license fees, but copyright owners are entitled to be paid prescribed royalties for the secondary transmission of their works by cable television."

[336] It is worth noting that the Congress heard considerable testimony on compulsory licensing *per se* and applied it not only to cable television but also in other situations involving, for example, jukeboxes and phonorecords. Subcommittee Chairman Kastenmeier described the compulsory license mechanism as used when an industry goes from no liability to full liability, "a compromise between economic forces . . . a useful device to accommodate diverse interests in copyright, particularly when a change of liability is contemplated by the statute." 1979 Copyright Hearings *supra*, n. 314 at 109-110. The Register of Copyrights has observed that:

> We have reached the point where any new rights under the copyright law cannot be made exclusive rights. If a new technological development makes new forms of exploitation possible, compulsory licensing seems to offer the only solution. This is happening in the United States and it is happening just as much internationally. Compulsory licensing systems represent key provisions in the 1971 revisions of both the Berne and Universal Copyright Conventions, and in recent copyright laws in other countries.

Ringer, "Copyright in the 1980's," 23 *Bull. Copyright Soc.* 299, 304-7 (1976).

"the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting 'communications policy' . . . ."[337] As is apparent from the remainder of the Committee report, the Judiciary Committee wanted to avoid a time-consuming referral of the bill to the Commerce Committee, which has jurisdiction over "communications" legislation.[338] The characterization of the copyright legislation as not even "affecting" communications policy presupposes an absence of overlap between communications and copyright policy which is unrealistic and cannot have been the literal understanding and intent of the Congress. Indeed, the very same sentence that says the Committee has avoided "affecting 'communications policy' " speaks candidly of "the copyright *and communications elements* of the legislation."[339] The key to the Committee's and the Congress' intent regarding the preemption of Commission regulatory authority to impose retransmission consent is in the emphasized language of the next sentence in the report:

> We would, therefore, caution the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any actions of this Committee as a basis for any significant changes in the delicate balance of regulation *in areas where Congress has not resolved the issue.*[Emphasis added.]

The next sentence identifies "pay cable regulation" and "increased use of imported distant signals" as examples of areas where Congress has not resolved the issue but left the matters to Commission regulation. But retransmission consent is not what the Committee meant by "increased use of distant signals." The Committee had in mind Section 801(b)(2)(B) which, by clear implication, leaves the Commission free "to permit the carriage by cable systems of additional television broadcast signals." But plainly the grant of a compulsory license, not subject to withdrawal by the broadcaster or the copyright owner, was an "area" where Congress *has* "resolved the issue." The same is true as to the mechanism for setting royalties. Had the Committee intended to allow the Commission freedom to undo what the legislation had created specifically and in excruciating detail, it surely would have said so.[340]

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[337] H.R. Rep. No. 94-1476, *supra*, at 89.

[338] *Id.*

[339] *Id.* (emphasis added).

[340] Section 801(b)(2)(C), by implication, leaves the Commission free to change its "syndicated and sports program exclusivity" regulations. Had Congress meant to broaden that implicit authority so as to permit the imposition of retransmission consent, presumably it would have used this Section or the legislative history accompanying it to make that intent clear. Congress did nothing of the sort. Nor is there anything in the legislative history of the savings clause in Section 301(d). The relevant reports simply quote or paraphrase that clause. See, e.g., H.P. Rep. No. 94-1476, *supra*, at 133; H.R. Conf. Rep., No. 94-1733, 94th Cong., 2d Sess. at 78-9 (1976). The Conference Report does make clear, however, that the legislation was intended to "establish [ ] a *single Federal system of copyright.*" *H.R. Conf. Rep., No. 94-1733,*

316. Nor can we find that either major market cable systems or satellite transmission of distant signals were not within the purview of Congress in adopting the Copyright Revision Act, thereby making the application of retransmission consent to major market systems or to satellite-relayed signals a matter of communications policy within the jurisdiction of this Commission to consider. Here again it is plain that both these developments were clearly foreseen—indeed had been clearly foreseen for over a decade—at the time the Copyright Revision Act was adopted. The Commission was aware of the development of major markets cable systems as long ago as 1966,[341] and of course the Commission's 1968 retransmission consent proposal was specifically premised on cable's penetration of the major markets.[342] The Supreme Court referenced cable penetration of the major markets in its 1968 decision in *U.S. v. Southwestern Cable Co.*[343] Congress was also aware of major market cable penetration as early as 1965[344] in the course of committee hearings on the Copyright Revision Act. During these hearings representatives of cable corporations serving major market communities, including the cable corporation that operates a cable television system in New York City, appeared to testify.[345] Finally, the Committee considered econometric studies projecting the results of various voyalty fee levels specifically on major market systems. Similar evidence also definitely lays to rest any suspicion that the Congress did not intend to include satellite-relayed signals within the

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supra, at 78 (emphasis added). Congress did not contemplate that the FCC could establish a second system providing copyright-equivalent protection inconsistent with the system set forth in the 1976 law.

[341] See generally *Second Report and Order in Dockets 14895, 15233, and 15971*, 2 FCC 2d 728 (1966).

[342] See generally *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, supra*. See also *Notice of Proposed Rule Making in Docket 18894*, 23 FCC 2d 38, (1970) which lists in Appendix B the data on existing and proposed cable systems in the 50 largest television markets and *Second Report and Order in Dockets 14895, 15971, and 15233*, 2 FCC 2d 723, para. (1968) where the Commission states "Our intention has been called to the asserted intent of CATV interests to wire up 'almost all American cities—small and large' and 85 percent of all television sets —40 million homes." (footnote omitted).

[343] 392 U.S. at 159–166.

[344] In 1965 Mr. Ernest Jennes on behalf of the Association of Maximum Service Telecasters testified in the context of copyright hearings about "CATV unlimited": that is, "multichannel systems, importing distant stations [from metropolitan centers across many hundreds of miles and several states] . . . trying to mushroom into cities and towns of all sizes where reception of local and area broadcasting stations is excellent." Hearings before Subcommittee no. 3 of the House Judiciary Committee on H.R. 4347, 5680, 6381, and 6835, Serial no. 8, *supra*, n. 332 at n. 64 (pt. 2) 1225. See also *id.*, (pt. 3), 1823. The General Counsel of the National Association of Broadcasters noted pendency of cable franchises for New York, Philadelphia, Cleveland, and other large cities); and see H. Rept. No. 2237, 89th Cong. 2d Sess., (1966), 78.

[345] E.g., William J. Bresnan, President of Cable Division of Teleprompter Corp. And see statements of Rex Bradley, President of the National Cable Television Association, *id.* at 660.

universe of "distant signals" for which a compulsory fee is available. As in the case of major-market cable, satellite transmission was envisioned as long ago as 1965,[346] and the fact that satellite-relayed distant signals were intended by Congress to be subject to compulsory licensing is evident from the additional concurring views of Congressman Danielson:

> Today cable is able to do more, and often does more, than merely to intercept a signal and deliver it to the subscribers' receiving set located within the local market area of the primary transmitter. With advances in the state of the art, cable systems are now able to transmit signals by cable, microwave, and satellite, almost without limit as to distance . . . Cable now can, and does, transmit signals far beyond the local market area. In the bill we refer to these as "distant signals." Admittedly they serve the public interest.[347]

In sum, the Congress appears to have been well aware of the trends toward cable growth in the major markets making use of satellite delivered programming.

317. The sports interests filing comments in this proceeding have complained of the lack of attention given their interests and have sought to make out a case that they deserve some separate special treatment. We consider these comments here because one of the principal requests of these parties (the National Football League, the Commissioner of Baseball, the National Basketball Association, and the National Collegiate Athletic Association) is that the retransmission consent proposal be adopted.

318. We recognized in the *Notice of Proposed Rule Making* in this proceeding (para. 43) that sports provide one of the major sources of television programming. It is also obvious that there are many differences between sports and other types of television programming and between the various types of sport events that are broadcast. There are also differences between the other types of television programming of equal magnitude—between feature films and made for television product and between off-network and first-run syndicated programs. These differences, however, we do not find to be determinative for purposes of this proceeding. Thus, for example, while sports events are disadvantaged in some respects by the absence of repeat performance possibilities, they are in an advantageous position in other respects in that they are not entirely dependent for

[346] *See*, e.g., Hearings of H.R. 4347, 6831, 6835, *supra*, n. 322 at n. 64, (pt. 2), 1369 (Kastenmeier statement); H. Rept. 1635, 89th Cong., 2d Sess., 18 (1966) (minority views); *Final Report of the President's Task Force on Communications Policy*, chapter 5 (1968); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, *supra*, n. 295, at 420.

[347] Additional concurring views of Representative Danielson, H. Rept. no. 94-1476, 94th Cong., 2d. Sess., 359. *And see* statement of Register of Copyrights Barbara Ringer, "[T]he legal relationship between cable television and space satellite systems was well-known and much discussed in the mid-1970's . . ." Hearings on H.R. 3333 before Subcomm. on Communications of House Comm. on Interstate and Foreign Commerce, 96th Cong., 1st Sess. at 700 (1979).

their financial success on television revenues, making the bulk of their revenues from attendance at the events themselves.

319. The argument pressed here, that sports is different and requires greater regulatory concern, is not a new one. In an earlier proceeding in which the Commission considered separate limitations on the cable carriage of sports programming, the Commission stated, summarizing the contentions of the sports interests, that:

> The argument is now put forth that sports programming is different than all other television programming and should be treated differently by the Commission's cable rules. It is argued that because sports programming is highly perishable, and because the sports industry depends heavily upon broadcast revenues for its sustenance, the public interest requires strict regulations to maintain the present pattern of distributing sports programs.[348]

The Commission found, however, that while the adoption of specific rules to cover the situation in which home games were blacked-out was appropriate,[349] there was no other basis for the separate treatment requested. Thus, we said,

> We can find no public interest rationale in terms of our national communications policies for affording sports programming additional protection against audience fragmentation. Sports is but one form of television programming, and must compete for audience with other programs provided by local television stations and cable systems. Absent convincing evidence that distant signal sports importations threaten to undermine local conventional television service, we are not prepared at this time to issue new rules to sustain the audience levels of established television broadcast stations at the expense of existing and potential cable television viewers.[44]

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[44] The comments contain no evidence that local sports telecasts have been curtailed because of audience fragmentation resulting from cable sports importations, or that this is likely to occur. In fact, the audience of some television stations carried as distant signals by cable systems is significantly increased by such carriage, thereby creating a potential for increased advertiser support of the programs which they broadcast.[350]

320. The situation today remains essentially the same. Aside from anecdotal instances of alleged harm from distant signal carriage,[351]

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[348] *Report and Order in Docket 19417*, 54 FCC 2d 265, para. 41 (1975).

[349] 47 C.F.R. §76.67.

[350] *Supra*, n. 348 at para. 42.

[351] Compare comments of Commissioner of Baseball, pp. 24–26, concerning certain difficulties faced by the Pittsburgh Pirates with Evan Pottack, "The Pirates. Where is Everybody," *Pittsburgh, March 1979*, p. 30 (appended as exhibit B to the October 17, 1979 comments of the NCTA); also the NBC comments of September 17, 1979 stating "WGN was told that it could not be licensed to carry the games [certain NCAA basketball games] because it was a superstation and the license could infringe on other exclusive rights" with the statement of the President of the NCAA to the House Communication Subcommittee on May 14, 1979, "The bid of WGN was $8,000; clearly not a competitive bid despite its superstation status." Examples of games allegedly not broadcast due to cable carriage are also provided in the NCAA *reply* comments. While the information provided there, some of which

the sports interests have made no credible showing that the general amount of televised sports events has been or will be seriously diminished. Available data actually suggests the contrary. Using professional baseball as an example, we find that baseball's radio and television revenues generally tended to remain relatively static between 1972 and 1975, but after 1975, most teams' revenues increased markedly.[352] Moreover, professional baseball's 1979 network contracts of $200,000,000 are twice its former contracts. In 1976 total baseball attendance was 31,300,000, whereas in 1978 it had increased to 40,600,000. Even if attendance figures for the two new clubs added during that period were excluded, total attendance would be up 5.5 million. At the same time, television audiences increased 15 percent.[353] The National Basketball Association itself performed a study of cable's effect on its teams' live gates in 1975, and concluded that, "There is no direct evidence that cable or pay television carriage of competing games have adversely affected paid attendance.[354] The Commission's most recent annual report to the Congress on the effect of the anti-blackout law concluded, with respect to professional football, that live gate attendance generally appeared to be more affected by such external factors as weather conditions, caliber of the opposing team, and the home team's season record than by televising of competing games.[355] Moreover, the television audience preferred to watch home team games over other teams' games by a 5–1 margin.[356] We find no evidence indicating that the same conclusions should not apply to collegiate sports.

321. Although sports interests cite statements in the legislative history of the 1976 Copyright Act which they argue "clearly demonstrate that the Commission has the authority to exclude sports programming from the compulsory licensing provision of the Copyright Act"[357] we do not read this language as suggesting anything other than that the Commission should act within the scope of its authority if necessary for legitimate Communications Act purposes. In rejecting a proposed separate treatment of sports in the Copyright Act, the Senate Report simply stated that:

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relates to isolated games played in 1974 and 1975, is not sufficiently detailed to reveal the precise reasons for these games not being broadcast, in the past the Association's own rules have in some circumstances counted cable carried games against the broadcast quotas permitted individual schools. Thus, the NCAA examples may be to some extent of their own creation.

[352] The Final Report of the Select Committee on Professional Sports, H. Rept. 1786, 94th Cong., 2d Sess., App. III A-2 (1977).

[353] Testimony of Gerald A. Simon, managing director, Cambridge Research Institute, 1979 Copyright hearings, *supra*, n. 314 at 149.

[354] Senate Communications Act rewrite hearings, *supra*, n. 309 at 2450.

[355] Fifth Annual Report of the Federal Communications Commission on the Effects of Public Law 93–107, 95th Cong., 2d Sess., 1978 (committee print), 21–43.

[356] *Id.* at 5, 19.

[357] Comments of Commissioner of Baseball in Dockets 20988 and 21284, September 17, 1979 at 54.

> Without prejudice to the arguments advanced in behalf of these proposals . . . these issues should be left to the rulemaking processes of the Federal Communications Commission, or if a statutory resolution is deemed appropriate to legislation originating in the Committee on Commerce.[358]

322. In sum, we do not find anything in the comments received to change the judgment arrived at in Docket 19417, *supra*, that, except for the provisions of Section 76.67, sports programming should stand on the same footing as all other programming.

323. We also find that the savings clause in Section 301(d) of the Copyright Revision Act does not eliminate the fundamental irreconcilability between the Copyright Revision and a Commission-imposed retransmission consent requirement. Normally when two statutes deal explicitly with the same subject, Congress makes clear by a repealing clause that the later statute supersedes the earlier one. On the other hand, "repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 198 (1929). In the absence of an express repealer, "[w]hen there are two acts upon the same subject, the rule is to give effect to both *if possible*." *Id.* (emphasis added). For an implied repeal, there must be "a positive repugnancy" between the two statutes. *Id.* at 199. One common formulation of this principle is that an implied repeal will be found only to the minimum extent necessary to enable the later statute to "work." *E.g., Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 683, 691, (1975). Another somewhat overlapping formulation is that Congress will be found to have intended the repeal of the earlier statute if the later statute creates a comprehensive and pervasive regulatory scheme over the subject matter. *E.g., United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 734–35 (1975).

324. In the present instance, the Copyright Law Revision establishes just such a comprehensive and pervasive regulatory scheme over cable retransmissions of copyrighted programs. For that scheme to "work," any contrary regulatory authority must give way. More specifically, for the cable operator to be assured of retaining his statutory right to transmit the copyrighted programs, there cannot be a contrary FCC regulation which directly empowers a broadcaster (and indirectly empowers the copyright owner) to prevent such transmission by withholding consent. To preserve the statutory ceiling on fees, there cannot be a contrary FCC regulation which empowers the broadcaster (and, indirectly, the copyright owner) to extract greater fees.

325. The savings clause in Section 301(d), referred to above, does not alter our view that the 1976 law preempts the Commission's authority to impose a retransmission consent requirement. Any generalized savings clause must be interpreted in the context of the entire statute. Its general language cannot be intended to render those other, more specific regulatory provisions "nugatory." *Texas & Pacific*

[358] S. Rep. No. 94–473, 94th Cong., 1st Sess. 80 (1975).

R. Co. v. Abilene Cotton Oil Co. 204, U.S. 426, 437, 446 (1907). Where there is "an irreconcilable conflict between the statutory scheme [of the later statute] and the persistence of . . . [rights or] remedies" under earlier enacted law, the savings clause will not prevent an implied repeal of the earlier law. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 298–99 (1976). See, e.g., *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 388–89 (majority opinion), 410 (dissent) (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 310 (majority opinion), 321 (dissent) (1963); *Texas & Pacific R. Co. v. Abilene Cotton Oil Co., supra*, 204 U.S.at 446. In each of these cases the savings clause stated:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

This language, insofar as it applies to preexisting Federal statutes, is indistinguishable from Section 301(d) of the 1976 copyright law. The quoted language did not prevent a finding of implied repeal of the 1890 Sherman Act and the 1914 Clayton Act by the 1958 Federal Aviation Act in *Hughes Tool* and *Pan American, supra*. Consequently, the language of 301(d) does not bar a finding that the 1976 copyright law deprived the FCC of any preexisting retransmission consent authority under the Communications Act of 1934, where such authority would be irreconcilably in conflict with the 1976 law.[359]

326. We believe that the above demonstrates that the policy grounds urged to us in favor of this proposal, on careful examination, are fundamentally related to the operation of the copyright laws and that the Congress considered these issues with a full awareness not only of the developing course of the cable television industry but with a full awareness of the various public interest tradeoffs involved in the compulsory copyright licensing system. Finally, it seems clear that what we are being asked to do here is to overrule the judgment of the Congress because "the present copyright scheme is patently inadequate" and "provides only token compensation to copyright holders" (comments of ABC) or not to do so would result in "anomalies", "skew the market", or not "end government intrusion" (comments of NTIA). Since this agency is itself a creature of Congress we do not see how we can take it upon ourselves to correct the judgments it has made and, accordingly, believe this proposal to be beyond our authority.

327. We also sought comments in our rulemaking *Notice* on other ways to facilitate the operation of these markets including means of facilitating the development of the types of information that are

[359] Retransmission consent's proponents note that passage of comprehensive equal employment legislation administered by the EEOC did not deprive the FCC of concurrent jurisdiction over EEO matters. That situation is obviously distinguishable. FCC enforcement of EEO requirements *complements* and does not conflict with the EEOC's jurisdiction.

required for television stations to receive value for the distant cable television audiences they receive. Virtually no comments were received in response to this invitation and while we continue to hold ourselves open to suggestions of this type in the future, it appears that all that is required at this point is a certain regularity of cable carriage and the amassing collectively of sufficient audiences to make the commercial collection of information feasible. It appears that this process is now beginning to occur on its own. Accordingly, we are not proposing to take any additional action at this time.

V. Conclusion

328. The focus of our attention throughout this proceeding has been the effect of distant signal carriage on television service to the public. We have relied upon three criteria, consumer welfare, external effects, and distributional equity, to ascertain whether our rules regarding distant signal carriage are beneficial or detrimental to the public interest. These criteria, which have been developed in the field of modern welfare economics and which couch our traditional basis of regulation in more precise terms, provide a framework to test whether the benefits to consumers from our rules exceed the costs.

329. The criterion of consumer welfare reflects our responsibility to assure "efficient" communication service by seeking the industry and regulatory structure that results in the service that consumers value most highly. In addition to the benefits that accrue only to the consumers of a service, the criterion of external effects factors into the analysis the benefits from a service that flow to society as a whole. For example, public service programming by television stations may provide an important contribution to the functioning of our democratic institutions. Finally, distributional equity focuses upon whether the benefits or costs of our rules are received disproportionately by a particular group of consumers. For example, it is possible for a rule that confers greater benefits than costs upon consumers to be socially undesirable because of an adverse distributional effect upon poor or rural residents.[360]

330. We have analyzed with great care the benefits and costs to consumers of our cable television regulations. We have found that the benefits to consumers from eliminating the distant signal carriage and syndicated exclusivity rules are substantial. Or, in other words, the costs imposed upon consumers by the rules are great. The rules artificially restrict competition and thereby deny consumers services that they are willing to pay for. The rules also have the effect of restricting diversity in television programming by delaying or impeding the provision of new cable television service in many communities. Thus we conclude confidently that elimination of the distant signal

[360] For a more complete description of the criteria, *see* the *Report in Docket 21284, supra* at paras. 8–14, the *Report in Docket 20988 supra* at paras. 11–14 and the *Notice of Proposed Rulemaking in Dockets 21284 and 20988 supra* at paras. 50–53.

carriage and syndicated exclusivity rules will enhance consumer welfare by promoting competition in both the economic marketplace and the marketplace of ideas.

331. Were there offsetting costs to consumers from eliminating the distant signal carriage and syndicated exclusivity rules, we would be obliged to quantify and compare both the costs and benefits, including any effects upon particular segments of our populace, and reach a judgment as to the degree of protection for local television broadcasters that is required to promote the best attainable distribution of video services. However, the evidence amassed in this proceeding demonstrates clearly that increased competition from less proximate broadcasters will not affect adversely the performance of local television broadcasters. Additionally, there is no evidence that shows that maintenance of the rules expands the supply of television programming or that elimination of the rules will threaten the continued supply of programming. Therefore, we conclude that the distant signal carriage and syndicated exclusivity rules should be eliminated.

332. The factual basis of our findings is considerable. Our *Inquiry Reports* carefully examined the effect of distant signals both on the performance of local broadcasters and on the supply of television programming. In the *Report in Docket 21284* we analyzed many cases where broadcasters areoperating essentially in deregulated markets because of the grandfathering provisions of our rules. We also studied every case where broadcasters claimed harm due to cable television. We monitored the financial trends of each of these stations over the most recent five year period for which we had financial data. Additionally, for the grandfathered markets and for the most extreme cases of the broadcasters claiming harm due to cable, we estimated the effect of cable television on the stations' audience and revenues to determine whether cable threatened the economic viability of the stations. Finally, we estimated the effect of cable television on the amount of local programming provided by local broadcasters. Our conclusion from this detailed analysis was that "the effect of audience diversion on revenues, both in theory and in practice (based on the experience of those markets with extraordinarily high penetration today), simply is not sufficient to offset the general growth in demand for TV advertising except in rare cases."[361] Additionally in the *Report in Docket 20988*, having analyzed the impact of the syndicated exclusivity rules on program supply, we concluded that "the long-term financial outlook for television program production is good, with continued increases in revenues and profits expected for the industry, even with the complete deregulation of cable television."[362]

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[361] *Report in Docket 21284* at para. 141.
[362] *Report in Docket 20988* at para. 95.

333. Despite the voluminous amount of comments we have received opposing our proposal to delete the distant signal carriage and syndicated exclusivity rules, there is no evidence in the record that shows our estimates of audience diversion due to cable television in the case studies analysis are incorrect; there is no evidence in the record disputing our finding that broadcasters revenues and profits have increased substantially; there is no debate in the record concerning our estimate of the effect of cable television on the amount of public service programming broadcast by local stations; there is no evidence contradicting our finding that the supply of programming will continue to expand even with the complete deregulation of cable television. However, in the latest round of comments, some additional stations have alleged harm due to cable television. We have carefully examined the financial results for each of these stations. We have found that cable television does not pose a threat to the economic viability of any of these stations. Therefore we affirm our conclusions that "it seems extremely unlikely that any non-cable viewers will be disadvantaged due to increased competition for television stations from cable television"[363] and that "non-cable viewers will not be disadvantaged due to the elimination of the syndicated exclusivity rules."[364] Given these findings our obligation to rescind the rules is clear.[365]

Authority for the rule amendments adopted herein is contained in the Communications Act of 1934, as amended, including Section 2, 3, 4(i) and (j), 301, 303, 307, 308, and 309.

Accordingly, IT IS ORDERED, That effective October 14, 1980 Part 76 of the Commission's Rules and Regulations is amended as set forth in the attached Appendix E.

IT IS FURTHER ORDERED, That the proceedings in Dockets 20988 and 21284 are terminated.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

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[363] *Report in Docket 21284* at para. 141.
[364] *Report in Docket 20988* at para. 96.
[365] *HBO v. FCC* 567 F. 2d 9, 42 (D.C. Cir. 1977).

APPENDIX A

HISTORY OF SIGNAL CARRIAGE REGULATION

Frontier Broadcasting

1. The Commission was initially asked to exercise jurisdiction over cable television systems in 1956. At that time thirteen television broadcasters concerned with the impact of cable carriage of broadcast signals on local television stations asked the Commission to exercise authority over cable television under the common carrier provisions of the Communications Act.[1] This was the first serious invitation we received to restrict cable competition with television broadcasting. We pointed out that, while a cable system "would, in adhering to good business practice, be governed largely by the preferences expressed by the majority of its subscribers, the ultimate final choice of signals is the sole responsibility and prerogative of the CATV operator." 26 FCC 254. Accordingly, the Commission determined that cable systems as they then operated did not fit into the statutory scheme of the Communications Act applicable to common carriers. *Id.* at 255.

Report and Order in Docket 12443

2. A similar invitation to impose common carrier regulation on cable systems was declined in our *Report and Order in Docket 12443*, 26 FCC 403, 424 (1959). We reiterated the rationale expressed in *Frontier Broadcasting* and also considered the evidence of economic impact on local television service as a basis for regulation but found such evidence to be insufficient to restrict cable television operations. *Id.* at 430.[2] On the subject of competition from cable system signal carriage as well as other auxiliary services, the *Report* stated that it "is basically the public which must determine the question, as in all broadcasting and free enterprise businesses." 26 FCC 436, para. 86. In sum, the *Report* concluded "that we do not now know of circumstances which would justify limiting or prohibiting the operation of satellites or translators, or of CATV systems" and that "we do not now envision where we could find that the public interest would be disserved by affording an opportunity for choice of service and the benefits of competition and diversity of expression" from authorization of auxiliary services. Paras. 86–87, *id.* at 436–437.[3]

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[1] *Frontier Broadcasting Company v. Collier*, 24 FCC 251 (1958), *recons. denied in conjunction with, Report and Order in Docket 12443*, 26 FCC 403 (1959).

[2] The Commission stated:

> We have expressed above our inability to determine where the impact takes effect, although we recognize that it may well exist. Accordingly, we would find it impossible, from anything presented to us so far, to make the necessary finding, either in a particular situation or generally.

Id.

[3] Also addressed was the question whether Section 325(a) of the Communications Act was applicable to retransmissions of broadcast signals by cable systems. We recognized that "[i]t may well be that Congress would desire to protect the property right of a broadcaster" but stated that we cannot conclude "that section 325(a) in its present form includes the requirement that CATV's get the consent of the stations whose signals they carry." 26 FCC 430. The Commission was also asked "to recognize the existence of a property right, and to affirm it by rule" but in response stated that "[t]his is not the forum in which the existence or nonexistence of a private property right can be adjudicated." *Id.* We stated, however, that it would be desirable "to clarify the situation with respect to property rights" and "to place CATV under the same conditions as the broadcaster with respect to access to programs originated by other stations" and, accordingly, stated our intent to "request Congress to enact

Carter Mountain

3. In *Carter Mountain Transmission Corp.*,[4] the Commission was presented with the question of whether economic impact to a local television station constituted a sufficient basis to deny an authorization for a common carrier microwave facility that would be used to deliver television broadcast signals to a cable system's in the station's service area. The *Report and Order in Docket 12453* had previously considered the question of whether the Commission, under sections 307(a) and 309(a) of the Communications Act, was required to consider impact on television broadcasters in granting radio facilities to common carriers for use in providing signals to a cable system. We concluded that "it is neither proper, pertinent, nor necessary for us to consider the specific lawful use which the common carrier subscriber may make of the facilities of the carrier." 26 FCC at 431–433.[5] As a consequence, cable operators sought to meet the increased consumer demand for additional and technically improved signals by requesting microwave services from communications common carriers.

4. The Commission recognized the importance of distinguishing between economic injury to a television licensee and an injury to the general public, as we had in our *Report and Order in Docket 12443*,[6] but we were concerned that the proposed microwave service to the cable systems might destroy the only local television station in the area and deprive a substantial population in the outlying rural areas of the only local outlet and of access to any other video services. We said, "[w]e will not shut our eyes to the impact upon the public service which is our ultimate concern, when it appears that the grant may serve to deprive a substantially large number of the public of a service . . . ." 32 FCC at 462. While the proposed common carrier service might improve service to cable systems in the area, it did not warrant the substantial risk of loss of television service to that area. Accordingly, we believed compelling reasons justified departure from our previous position taken in 1959. *Id.* at 465. Our interest in safeguarding the welfare of off-the-air viewers in the only local broadcast service in the area did not extend, however, to denying, the subscribers of cable services the benefits of increased diversity from the availability of distant signals unnecessarily. We therefore permitted refiling of the application if it could be shown that the cable system would carry the signal of the

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legislation requiring [cable systems to obtain the consent of the originating stations]." *Id.* at 430, 438–439.

[4] 32 FCC 459 (1962), *aff'd Carter Mountain Transmission Corp. v. FCC*, 321 F. 2d 359 (D.C. Cir. 1962), *cert. denied* 375 U.S. 951 (1963).

[5] We were also asked in the same proceeding to require that microwave common carriers show that they or the cable systems they serve have the consent of the originating station whose signals they transmit. The broadcasters requesting such a requirement indicated that while a direct requirement of cable consent might be beyond the Commission's power, such a requirement could be imposed on the Commission's licensees on the basis that relaying or transmitting signals without consent constituted "piracy" and therefore reflects upon the character qualifications of the licensee. They argued that the Commission should not license facilities whose sole purpose was to engage in such activities. We rejected the contention as "without merit" and pointed out that "the matter of whether a property right exists has not been adjudicated" and that this requirement could not be imposed upon a carrier for the same reasons which we held applied cable broadcast signal carriage. 26 FCC at 433–434.

[6] In *Report and Order in Docket 12443*, 26 FCC at 423, we pointed out "good service is shown on this record to be on occasion a result of *competition* —the competition provided by the auxiliary services." While we admitted our inability to determine from the data before us "in what situations this impact becomes serious enough to threaten a station's continued existence or serious degradation of the quality of its service," we stated that "in considering economic injury, broadcasting is a dynamic business. If one station goes under, another station, or here another form of service fulfilling many or all of the same functions, may well soon replace it." *Id.*

local station without duplication of its programs by distant signals. *Id.* at 365. Thus, our concerns did not extend to the local station itself but rather to the welfare of television viewers as a whole.

Dockets 14985 and 15233

5. The Commission imposed restrictions of general application on microwave-fed cable systems' signal carriage in the *First Report and Order in Dockets 14895 and 15233*, 38 FCC 683 (1965). While we indicated that "the development of CATV and other auxiliary means for distributing the signals of assigned stations to the public (something not envisioned at the time of the sixth report and order) now makes possible the realization of some of the most important goals [of] our allocations planning," we became increasingly concerned that cable systems, "which technically, cannot be made available to many others," develop "on a fair and orderly basis" which would not prove disruptive to our television allocations policy and which would not adversely affect the distribution of video services to different segments of society. *Id.* at 698-699. While we found "it impossible, with the data at hand, to isolate reliably the effects of CATV" on television broadcast service, *id.* at 710, we believed that our statutory responsibilities made it incumbent upon us to initiate regulatory efforts to mediate the competition between these two communications technologies to insure that there would be a healthy co-existence between cable television and television broadcasting which would prove to be beneficial, not detrimental, to the interests of the television viewing public. We believed it imperative to plan "in advance of foreseeable events, instead of waiting to react to them." *Id.* at 701. Accordingly, as minimum regulatory measures toward this end, the Commission adopted rules which required microwave-served cable systems to carry, upon request, the signals of all local television stations and to refrain from duplicating the programs of local commercial stations either simultaneously or within 15 days before or after local broadcast.[7]

6. Our reasons for imposing these requirements stemmed from the different conditions which are found in ordinary competition among broadcasters. We considered cable's duplication of programs of a local broadcast station by carrying competing distant signals, often without carrying the local station's signal, to constitute unfair or unequal competition inconsistent with what we then conceived as cable's supplementary role to broadcasting.[8] Accordingly, the Commission adopted regulations mandating cable system carriage of local television stations in order to eliminate a "kind of barrier to competitive access" which would otherwise exist if cable systems were permitted to exclude the local station's signal from carriage. *Id.* at 703. An additional concern which prompted the adoption of this requirement was that consumers of video services not be deprived of access to a local station's signals merely because they became subscribers to a cable system. *Id.* at 703.

7. The Commission also attempted to equalize competition between cable operators and broadcasters through the adoption of program exclusivity requirements. We pointed out that "the cable system does not enter the market for programming, as would a competing broadcaster." *Id.* at 703. We noted, however, that Section 325 of the Communications Act, which forbids the rebroadcasting of any station's signal without the consent of the originating station and which in large measure allows broadcasters to obtain exclusivity against one another, had not been found applicable to cable systems. Because cable "presently stands outside of the program distribution process," we considered this situation not to be the usual competitive situation. *Id.* at 704. While we emphasized that "[w]e do not regard the patterns of exclusivity created in the existing

[7] On the same day rules for microwave-served cable systems were adopted, the Commission commenced an inquiry and rulemaking looking toward extending regulation to all cable systems. *Notice of Inquiry and Notice of Proposed Rulemaking in Docket 15971*, 1 FCC 2d 453 (1965).

[8] 38 FCC at 705.

system for the distribution of television programs as sacrosanct," we believed that cable, as a supplementary service to television broadcasting, "should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market." *Id.* at 705–706. While we pointed out that Section 325 was not applicable to cable retransmissions and that Congress "has not seen fit to adopt [our] recommendation" of amending Section 325 to apply to cable, we stated that "reasonable nonduplication requirements will serve, in part. to achieve the equalization of competitive conditions at which the 'rebroadcasting consent' proposal is, in large part, aimed." *Id.* at 706 n. 37.[9] Thus, we clearly did not regard prevailing exclusivity practices as immutable in declining to recognize exclusivity agreements to the extent they provided protection beyond what we considered to be reasonable at the time.

8. In adopting mandatory signal carriage and program exclusivity rules, we readily acknowledged that "the rules we adopt will not solve all problems" and that "[i]f the rules should ultimately prove unnecessary or need modification in light of the passage of time, Congressional action or other factors, they can be modified or rescinded." *Id.* at 715. Our intent was to "build up a body of experience with the practical operation of both new rules and the conditions prescribed as interim procedures by our notices in these proceedings, before considering the extension of the rules to the CATV industry as a whole." *Id.* at 687.

Dockets 14895, 15233, and 15971

9. The Commission asserted jurisdiction over all cable systems the following year in the *Second Report and Order in Dockets 14895, 15233 and 15971*, 2 FCC 2d 725 (1966). We stated that "We cannot ignore the increasing risk of adverse impact on the 'public interest in the larger and more effective use of radio' (sec. 303(g))" which accompanies the development and growth of cable television, *id.* at 728, and that "our statutory powers . . . include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used." *Id.* at 734.

10. The mandatory signal carriage and program exclusivity requirements were extended to non-microwave systems. However, the period of program exclusivity available to a broadcast licensee was reduced to same-day protection in recognition of "the valuable contribution of CATV in providing wider access to nationwide programming and a wider selection of programs on any particular day." *Id.* at 747.[10]

11. The Commission recognized, however, that program exclusivity in its previous as well as its present form provided only limited protection for syndicated programming and independent stations which were heavily dependent upon such programming. "Stated differently, the adoption of a uniform 'same day' rule will not, in our judgment, significantly affect the protection afforded as to nonnetwork or independent programming" because "[s]uch programming is not presented on a nationwide simultaneous or even nearly simultaneous basis." *Id.* at 748. The Commission concluded that "we must look elsewhere if we are to achieve effective relief" for syndicated programs and independent stations. *Id.*

12. We proposed to do so by recommending to Congress that it consider the question

[9] We also acknowledged the pendency of copyright suits in which program suppliers were attempting to establish their right to control the use by cable systems of signals carrying their programs but we declined to express any view as to the merit of these suits since we said they concerned matters beyond our jurisdiction. 38 FCC at 704 n. 32.

[10] Our action constituted further acknowledgement that we did not consider prevailing exclusivity practices or our program exclusivity rules to be immutable.

of extending the rebroadcasting concept of Section 325(a) to cable as a general approach encompassing all stations, and by initiating a new set of rules the principle feature of which would be a restriction that cable systems operating in the top 100 television markets could import signals only following an evidentiary hearing establishing that "such operation would be consistent with the public interest and particularly the establishment and healthy maintenance of UHF television broadcast service." *Id.* at 782.

13. We were especially concerned about the impact cable carriage of distant signals might have on UHF broadcasting and pointed out that both cable and UHF broadcasting "are entering the larger markets, most often in an effort to bring programming that is not now available in these markets" and that "the most critical question posed is how these two trends mesh in the ensuing years." *Id.* at 772. We conceded that the "plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV . . . and, correspondingly, to what its impact will be upon UHF developments in these markets." *Id.* at 773. We believed that cable carriage of "big city VHF independents carrying "expensive, attractive nonnetwork programming" might severely damage emerging independent UHF stations especially in view of our recognition that "the nonduplication provision would afford virtually no relief" to these stations. *Id.* at 775. We stated that we had a statutory obligation to insure that the development of cable would not have unacceptable distributional effects on the public and, accordingly, we proposed to "thoroughly examine the question of CATV entry upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals." *Id.* at 776. The major market, distant signal policy and procedure was intended to ameliorate cable's impact on television broadcast service to the public and, in some measure, redress the disparate competitive conditions existing between cable systems and broadcasters which stemmed from cable's operation "outside of the above program distribution process." *Id.* at 778. We believed that the case-by-case distant signal policy accompanied by the requirements carried over in modified form from the 1965 rules to be "the minimum measures . . . essential to insure that CATV continues to perform its valuably supplementary role without unduly damaging or impeding the growth of television broadcast service." *Id.* at 746.

14. While we recognized that "substantial problems affecting the public interest" could result from cable importation of distant signals into areas outside the top 100 markets, we noted that in these areas "the independent UHF (or VHF) station is much less likely to develop" and that "stations in such markets are apt to be three or less in number and network affiliated" which means that "nonduplication is effective." *Id.* at 783. We declined therefore to apply distant signal importation restrictions to these areas because we were aware "that there may be underserved areas where CATV can make its most valuable and traditional contribution." *Id.*

15. Thus, while we acknowledged the "important contribution to the public interest" which cable television performed by increasing viewing opportunities, in meeting the public's demand for good reception of multiple program choices, and in various other ways, *id.* at 781, we stated that we must "take hold of the future—to insure a situation where we or the Congress, if it chooses, can make fundamental decisions in the public interest upon the basis of adequate knowledge." *Id.* at 785. We stressed, however, "that we arenot committed to the status quo—to protecting existing investment against new technological advances." *Id.* at 788. Rather, we emphasized the importance of getting the facts, *id.* at 789, and that, as we gained knowledge and experience, of revising or of terminating our procedures. *Id.* at 786.

Docket 18397

16. Experience under the new hearing approach quickly proved unsatisfactory. It was concluded that "these lengthy, complex evidentiary hearings on the economic impact issue . . . have imposed a considerable burden upon the Commission and the participating parties," and, accordingly, the decision was made to close down the burdensome

major market hearings to the extent they were concerned with "impact upon the local broadcasting stations." *Id.* at 433–434.

17. Instead, the Commission proposed "to substitute a definitive policy for the evidentiary hearing procedure" by requiring cable systems within a 35 mile zone of a television station in the top 100 markets to obtain prior written permittion—retransmission consent—of the originating station if they wished to import the station's signal into the market. *Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397*, 15 FCC 2d 417, 429 (1968). On balance, we found that the evidentiary hearing procedure did not serve the consuming public, its intended beneficiary. However, experience with this process indicated that cable penetration in the major markets could be significant and, accordingly, "the unfair competition of CATV" could be "a significant factor in the development or healthy maintenance of television broadcast service." *Id.* at 431. We concluded that it would be inconsistent with our responsibilities for the regulation of television broadcasting "to permit the growth of substantial CATV operations carrying distant signals in major markets until the aspect of unfair competition is eliminated." *Id.* at 434.

18. We viewed the retransmission consent proposal as a "simpler device" "permitting market forces to eliminate the unfair competition" than the "alternative of adopting detailed nonduplication requirements" for nonnetwork programs. *Id.* at 432. We also acknowledged at the time that this approach may "not be fully effective or may have drawbacks not now foreseen." *Id.* We emphasized that the "purpose of this proceeding is to obtain all such relevant information as to what regulation would best serve the public interest." *Id.*

19. While we were particularly concerned with cable carriage of distant signals in the major markets, we also expressed some concern over distant signal importation within the 35-mile zone of local stations in other markets. Although we believed that "the nonduplication requirement is effective as to network programming," we noted that "roughly 45 percent of a network affiliate's time is devoted to nonnetwork material" and that "it is this segment which is particularly vulnerable to continued fractionalization by a plethora of distant signals." *Id.* at 440. Accordingly, we also considered the possibility of limiting cable carriage to the signals of each of the network-affiliated stations and one independent for cable systems located within the 35-mile zone of a smaller market station. *Id.* For carriage of additional distant signals, retransmission consent would have to be obtained. *Id.* In all other respects, however, the program nonduplication rules were left essentially intact. We believed that our proposed rules for the smaller markets would take into account that there might well be a need for supplementary services in these areas. *id.* at 437 n. 18, but, more importantly, might "substantially alleviate potential problems in such markets and thus cut down greatly upon the need for any evidentiary hearings in this respect." *Id.* at 439.

20. Our retransmission consent proposal, without question, represented a radical and novel departure from the Commission's previously-held positions, espoused in earlier reports, that cable systems could not be made subject to the same type of requirement imposedon broadcasters under Section 325(a) of the Communications Act. While we believed it imperative to proceed toward elimination of the unfair competition element, we implicitly recognized the uniqueness of the new approach by noting that there are "other important developments which we should take into account." *Id.* at 437. "We refer specifically to important Congressional developments in the copyright field that bear *directly* on this issue of unfair competition." (emphasis added) *Id.* We pointed out that "there are substantial indications . . . there will be enactment of a copyright law providing for a fair and reasonable revision as to CATV" and that "[s]uch a revision may well reflect not just copyright but also communications and antitrust policies" and "thus constitute, to a significant degree, the legislative guideline which the Commission has

long sought." *Id.* at 432–433.[11] We stated that we must take these developments into account especially in view of our recognition that our retransmission consent proposal "necessarily also embodies considerations like copyright in its practical applications." *Id.* at 433. "Since Congress is considering the copyright matter, we should afford the opportunity for Congressional resolution of the unfair competition aspect, particularly since, as discussed, such resolution would constitute the Congressional guidance sought in this important area." *Id.* Accordingly, we stated our intent to refrain from taking action on our proposal "until an appropriate period is afforded to determine whether there will be congressional resolution of this crucial issue of unfair competition, with indeed congressional guidance in this whole area." *Id.*[12]

21. The retransmission consent approach did not, however, appear to be a workable alternative. In the absence both of the hoped-for Congressional guidance and of any sign that the retransmission consent proposal was succeeding, we considered a different approach in the *Second Further Notice of Proposed Rulemaking in Docket 18397-A*, 24 FCC 2d 580 (1970), under which cable systems in the top 100 markets would be permitted to carry four independent signals, in addition to local signals, but would be required to delete commercials on the distant signals and replace them with commercials provided by local stations. We indicated that the very nature of the proposal, involving commercial substitution on distant signals, required that it dovetail with copyright legislation. In so stating, we emphasized, however, that the "issue of fairness to copyright owners" is "not a matter which can be resolved by this Commission." *Id.* at 585. We expressed concern over the question whether our proposal would enable the copyright owner to be treated unfairly, but stated that "[o]nly the Congress can impose what it believes to be fair compensation in the circumstances" and that "the arena for definitive resolution of the issue remains the Congress, not this agency." *Id.* We did, however, prepare an analysis demonstrating how a compulsory payment mechanism might be developed. *Id.* at Appendix A. We also pointed out that under this proposal, the "carriage and same day nonduplication requirements would continue." *Id.* at 586. We further suggested that there might be other alternatives warranting consideration such as "whether it would be useful to employ an effective nonduplication requirement for nonnetwork programming." *Id.* at 588.

22. Our interest in arriving at a suitable solution that would allow cable to deliver new video services to consumers without endangering the availability of video services to off-the-air television viewers led to our consideration of new proposals and the abndonment of our earlier approaches as means to resolving this regulatory dilemma. Accordingly, by letter of August 5, 1971, the Commission advised Congressional committees considering cable-related legislation of a new regulatory plan for cable television which, "with appropriate review by Congress," could break the regulatory

[11] In the course of our discussion, we alluded to the Supreme Court's decision in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), which held that cable systems were not liable for copyright payment for the programs they received on broadcast signals. The rationale of that decision was extended to apply to programs on distant as well as local signals in *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974).

[12] In our *Memorandum Opinion and Order in Docket 18397*, 22 FCC 2d 589 (1969), the Commission indicated that it would grant "very few requests for experimental operations" under the retransmission consent proposal and that the rules adopted in 1966, as amended by subsequent orders, governed during the pendency of the proposed rulemaking in this docket. The Commission's actions in Docket 18397 led some leading observers to refer to this interim period as a "freeze" on cable growth, particularly in the major markets. However, other commentators have suggested that the freeze actually commenced with the hearing requirement under the 1966 rules. See MacAvoy, "Memorandum on Regulatory Reform in Broadcasting," (April 2, 1976).

impasse which had continued for almost six years and which could "provide necessary background for Congressional resolution of the copyright issue" relating to cable carriage of copyrighted materials on television broadcast signals. *Cable Television Proposals*, 31 FCC 2d 115 (1971). We stated that "our objective throughout has been to find a way of opening up cable's potential to serve the public without at the same time undermining the foundation of the existing over-the-air broadcast structure." *Id.* We determined that our retransmission consent and commercial substitution proposals "simply will not wash." *Id.* at 117. Our intention was "to break new ground, largely unexplored" which necessitated that we "proceed with caution." *Id.* at 115. We added that "further delay, in our view, would disserve the public and deny the nation tangible benefits." *Id.* While we recognized that "the continued economic health of those who create program material is crucial to both broadcasting and cable," we concluded "that copyright policy is most appropriately left to the Congress and the courts." *Id.* at 115–116. We therefore made plain that we would not continue to deprive consumers in the hope that the copyright complications engendered by a new technology might be resolved.

23. We noted that program exclusivity "is a matter that has both copyright and regulatory implications" and stated our intention "to study whether present or future considerations call for altering our existing CATV program exclusivity rules (Section 74.1103), which in effect protects only the network programming of network affiliates." *Id.* And we advised Congress that we would observe cable television's impact on local broadcast service very carefully under our proposed new regulatory plan and would take "prompt action" wherever necessary including affording adversely affected stations "effective nonnetwork nonduplication protection." *Id.* at 122. Accordingly, we did not envision any syndicated programming rules of general applicability as part of the proposed regulatory program we transmitted for Congressional review.

The 1972 Cable Television Report and Order

24. The cable television regulatory plan outlined in the Commission's transmittal letter to Congress of August 5, 1971, was subsequently adopted by the Commission in the *Cable Television Report and Order*, *supra*, but not without several changes. The major fundamental difference was the inclusion of rules providing exclusivity for syndicated programming which, together with the other changes, stemmed from the achievement of a "Consensus Agreement" which itself was the product of negotiations by interested parties concerning our August 5, 1971, proposal.[13] We concluded that incorporation of the new elements into our cable television program would "not disturb the basic structure of our August 5 plan" and would serve the public interest and, for these reasons, we adopted them as part of our *Cable Report and Order*. 36 FCC 2d 165–168.[14]

25. We pointed out that "the carriage of distant television broadcast signals by cable television systems has been center stage in the continuing controversy before the Commission, the Congress, and the Courts" and that in resolving the issues in this area, "our basic objective" has been "to get cable moving so that the public may receive its benefits, and to do so without jeopardizing the basic structure of over-the-air television." *Id.* at 164. We believed that this could best be accomplished by restricting the number of distant signals that a cable system may carry based on the size of the market in which it is located and the estimated ability of the market to absorb additional competition. By offering consumers of cable services an additional, but limited, number of signals, we expressed optimism that cable systems would be given the necessary impetus "to develop in the larger markets without creating an unacceptable risk of adverse impact on local

[13] See Consensus Agreement, Appendix D of the *Cable Television Report and Order*, *supra*.

[14] We also concluded that to entertain further comment in this area would serve very little purpose in terms of securing the public interest. 36 FCC 2d at 168.

television broadcast service" and, at the same time, our limitations would provide an incentive for the development of nonbroadcast services. *Id.* at 165.

26. We indicated that these signal carriage rules and policies represented our judgment at the time "as to: (a) the amount of distant signal competition that can be introduced into particular types of markets without having adverse impact on local television service and (b) the effect of distant signal carriage on the supply of television programming." *Id.* at 168. We acknowledged that in making these judgments, "[t]he answers rest in the complex economics of, and interrelationships between, the three industries involved as well as on expectations of future developments in the industries and in the economy generally." *Id.* As we had on previous occasions, we admitted our uncertainty and our inability to forecast how cable would evolve. We decided on a "conservative, pragmatic" approach which would permit us to add to our existing program in a significant way and "evaluat[e] our experience." *Id.* at 169. In so deciding, we authorized "not four distant signals, as proposed, but a more limited number (particularly in the smaller markets), and provided the added protection of non-network program exclusivity (particularly in the larger markets where independent stations generally operate). *Id.* We also considered it "wholly wrong to halt cable development on the basis of conjecture, for example, as to its impact on UHF stations" especially in view of our determination that our approach would not have impact adverse to the public interest. *Id.* Accordingly, we established through our 1972 signal carriage rules standards of television service that vary with market size in accordance with the estimated ability of these television markets to withstand additional distant signal competition.

27. Our justification for the "additional program exclusivity rules" was that they would "protect local broadcasters" and "insure the continued supply of television programming," the latter of which, we pointed out, "is fundamental to the continued functioning of broadcast and cable television alike." *Id.* at 169.[15] We provided "the most extensive protection" "in the top 50 markets from which the bulk of program supplier revenue is derived and where these restrictions are consequently most needed to insure the continued health of the television programming industry." *Id.*[16] We added that this "protection will also assist independent stations (including many UHFs) that are very largely concentrated in these markets." *Id.* We further stated that in the second 50 television markets, syndicated exclusivity protection would afford "additional, although limited, protection to local broadcasters." *Id.*

28. The Commission declined to extend protection in markets below 100 because in these markets "the number of distant signals is very strictly limited under the rules" and

[15] *But cf. Cable Television Proposals, supra*, at 115–116, where we stated that while "the continued health of those who create program material is crucial to both broadcasting and cable," "that copyright policy is most appropriately left to the Congress and the courts."

[16] *Teleprompter Corp. v. CBS, Inc., supra*, held, however, that the Copyright Act of 1909 did not afford copyright holders the right either to preclude or to charge royalties for the simultaneous transmission into distant markets by cable systems of a copyrighted work exhibited on a broadcast station. To the extent that the intent of the syndicated exclusivity rules was "to permit copyright holders to distribute programming in particular markets either by broadcast alone or, if they wish, by both broadcast and through distant signal carriage," as stated in our *Reconsideration, supra*, at 342, we ascribed a property right to copyright owners—the right to license a television broadcast exhibition of a copyrighted work and simultaneously to preclude its presentation in other markets through the mechanism of cable television—at a time when the existence of the right as a matter of copyright law was very much in doubt and which the Supreme Court later held did not exist under copyright law.

because, "network programming protection is, we believe, adequate to preserve local service." *Id.*[17] Moreover, we stated that to impose syndicated exclusivity protection in these markets "would make these markets even less desirable for new cable construction" and that, in any event, such protection "is of only marginal benefit to copyright holders who derive the substantial bulk of their revenues from the top markets." *Reconsideration of the Cable Television Report and Order* 36 FCC 2d 326, 341 (1972).

29. Our *Cable Television Report and Order, supra*, represented a comprehensive regulatory plan governing cable carriage of broadcast signals which permitted an increase in television programming available to consumers of cable services and a modicum of additional competition in the area of home video entertainment and information services. Despite an element of uncertainty, the Commission expressed a willingness to experiment with additional competition in the video services and, accordingly, the 1972 signal carriage rules constituted an important first step toward increased reliance on competition to serve consumers' interests and needs. In adopting this major cable regulatory program, including the incorporation of the syndicated exclusivity portion of the "Consensus Agreement", we emphasized that the Commission "retains full freedom, and indeed, responsibility to act as future developments warrant" and that, "as we gain experience and insight, we retain the flexibility to act accordingly—to make revisions, major or minor—and to keep pace with the future of this dynamic area of communications technology." *Id.* at 167.

Revisions in the Signal Carriage Rules Since 1972

30. As our understanding of the competitive relationship between cable television and broadcasting has increased through experience and insight, we have since 1972 cautiously but steadily eliminated restrictions on cable carriage of broadcast signals wherever it has been shown that such revisions would lead to expanding the supply of programs available to cable subscribers without simultaneously creating risks of serious harm to the welfare of off-the-air television viewers. This has led to increases in the supply of network news,[18] foreign language,[19] religious,[20] and late-night[21] programming to cable consumers and to our exempting cable systems with fewer than 1,000 subscribers from the signal importation and syndicated exclusivity restrictions.[22] By far the most significant change in our signal carriage rules was the elimination of the "leapfrogging rules" in *Report and Order in Docket 20487*, 57 FCC 2d 625 (1976), where we in essence concluded that the marketplace would secure the public interest more surely than administrative rules. This change in favor of additional diversity and in the direction of freedom of choice for consumers of video services subsequently proved to be a valuable impetus to the development of satellite distribution of broadcast programming to cable systems, a notable example of cost-reducing technology serving to increase the diversity of offerings available to consumers of video services.

The 1976 Copyright Law Revision

31. Our earlier concerns that cable systems were not subject to copyright liability for

[17] *Cable Television Report and Order, supra* at 181.

[18] *Carriage of Network News Programs-CATV, Notice of Proposed Rulemaking in Docket 19859*, 43 FCC 2d 813 (1978); *Report and Order*, 57 FCC 2d 68 (1976).

[19] *Specialty Stations-CATV, Notice of Proposed Rulemaking in Docket 20553*, 54 FCC 2d 425 (1975); *First Report and Order*, 58 FCC 2d 442 (1976); *recons. denied*, 60 FCC 2d 661 (1976).

[20] *Id.*

[21] *Cable Late-Night Television Programming, Notice of Proposed Rulemaking in Docket 20028*, 46 FCC 2d 446 (1974); *Report and Order*, 48 FCC 2d 699 (1974); *Memorandum Opinion and Order*, 54 FCC 2d 1182 (1975).

[22] *First Report and Order in Docket 20661*, 63 FCC 2d 956 (1977); *Second Report and Order*, 68 FCC 2d 18 (1978).

the retransmission of copyrighted materials on broadcast signals were ultimately addressed by Congress on October 19, 1976, when it enacted the General Revision of the Copyright Law, P.L. 94-553, 17 U.S.C. §§101 *et seq.* (1976) (effective January 1, 1978), which redefined the rights of, and limitations upon, copyright owners in the use of their works. Among other things, the Copyright Law Revision of 1976 provided a compulsory licensing procedure applicable to the retransmission of broadcast signals. Specifically, Congress provided in Section 111(c)(1) of the new Act that:

> secondary transmissions to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work shall be subject to compulsory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.

32. Indeed, the new law reflected a Congressional judgment that it would be impractical for cable operators to negotiate copyright clearances for non-network programs on distant broadcast signals as well as a Congressional awareness that the compulsory licensing procedure in this area constituted a major departure from traditional copyright practices.[23] Thus, Congress struck a new balance between consumers and copyright owners. The copyright owner would be compensated for the adverse effects distant signal carriage of non-network programming might have on the value of copyrighted works by means of royalty payments based upon cable systems' gross revenues. On the other hand, cable subscribers would have reasonable access to copyrighted programs on distant signals carried pursuant to Commission rules, regulations, and authorizations. Accordingly, while the compulsory licensing process limits the copyright owner in setting the terms and conditions for the use of copyrighted materials presented on television broadcast signals, particularly the flexibility to market programs on a geographically-restricted basis under the new copyright law, it allows the public to benefit by the wider dissemination of works carried on television broadcast signals.

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[23] See *Report of the House Committee on the Judiciary, Copyright Law Revision, supra*, at 89:

> In general, the Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system. Accordingly, the Committee has determined to maintain the basic principle of the Senate bill to establish a compulsory copyright license for the retransmission of those over-the-air broadcast signals that a cable system is authorized to carry pursuant to the rules and regulations of the FCC.

Congress provided for a compulsory licensing mechanism in Sections 115 (mechanical royalties) and 116 (jukebox) as well as in Section 111 concerning secondary transmissions by cable systems.

APPENDIX B

N-1334-FCC

November 1979

AUDIENCE DIVERSION DUE TO CABLE TELEVISION: RESPONSE TO INDUSTRY COMMENTS

Rolla Edward Park

A Rand Note

prepared for the

FEDERAL COMMUNICATIONS COMMISSION

Preface

This Note is a contribution to the Federal Communications Commission's *Inquiry into the Economic Relationship between Television Broadcasting and Cable Television*, Docket 21284. It discusses comments by representatives of the broadcasting and motion picture industries on an earlier Rand study, *Audience Diversion Due to Cable Television: A Statistical Analysis of New Data*, R-2403-FCC, April 1979. The work was performed pursuant to contract 0298 with the Federal Communications Commission.

Abstract

Analysis of broadcasting and motion picture industry criticisms of an earlier Rand report leaves unchanged the earlier report's conclusion that ". . . TV broadcasting will continue to prosper, despite increasing competition from cable." Some of the criticisms are accepted and used to produce revised projections of audience diversion due to cable. The effect of others is investigated using sensitivity analysis. Other criticisms are matters of judgment; on these, there is no reason to prefer the industry's approach to Rand's.

Acknowledgments

I appreciate helpful comments on an earlier draft by my Rand colleagues Willard Manning and Bridger Mitchell. Steven Zecola of the Federal Communications Commission also made useful comments and in addition worked hard to obtain all of the data on nonduplication protection status that I used in this study. Navid Nicoll of the FCC took care of administrative matters cheerfully and competently. Ethel Lang of Rand typed two versions of this Note with admirable precision, dispatch, and good humor.

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I. Introduction and Summary

A recent Rand report prepared for the Federal Communications Commission concludes that ". . . TV broadcasting will continue to prosper, despite increasing competition from cable."[1] The conclusion is based on a statistical analysis of data on cable and off-the-air television audiences.

The conclusion, and the analysis upon which it is based, have elicited critical comments from the broadcasting and motion p[illegible]e industries.[2] This Note is my reply to the industry criticisms. I accept some of t[illegible]iticisms and check the effect that some of the others would have on my results. None of them alters the conclusion stated in my earlier report.

Summary

In Section II, I estimate new audience share equations and a[illegible]y them to simulate the effect of cable on broadcast stations' audience size. The revised estimates differ from those in my earlier report for a number of reasons, most importantly because I now distinguish between distant network signals that are blacked out on the cable to provide nonduplication protection[3] to local affiliates, and those that are not. The effect of this and the other changes is small; the revised audience diversion projections (shown in Tables 3 and 4 below) are not much changed from those in my earlier report.[4]

In Section III, I discuss six major industry criticisms of my earlier report:

- data problems
- different effects in different time periods
- treatment of total audience
- distinction between stations and programs
- differences in off-the-air reception
- different effect on independents.

My new estimates in Section II avoid some of the problems. Others turn out not to be problems at all. I am able to check the sensitivity of my results to adopting the industry position on the first four criticisms and find that my results are affected very little by any of them. There is no simple way to do a sensitivity analysis of the other two criticisms, but neither is there any reason to prefer the industry-suggested approach to mine.

II. Revised Estimates of Audience Share Equations and Audience Diversion

Motivated in part by the industry comments on my earlier report (1979a), I have estimated new audience share equations and applied them to make new projections of audience diversion due to cable television. Although the new estimates differ from the earlier ones in a number of ways, the resulting audience diversion projections are changed very little.

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[1] Park (1979a).

[2] *Joint Motion* (1979), Fisher (1979), Schink (1979), Association of Independent Television Stations (1979), Charles River Associates (1979).

[3] Defined below (p. 3).

[4] Park (1979a, Tables 7 and 8, pp. 35–36).

How The Estimates Differ From The Earlier Ones

These are the ways in which the new estimates differ from the earlier ones:

- A few keypunch errors in the data have been corrected.
- Separate equations have been estimated for each portion of the television viewing day (daytime, early fringe, prime time, late fringe,[1] as well as the full broadcast day).
- I have taken account of the fact that some distant network signals are (sometimes) blacked out on the cable to protect local network stations ("nonduplication protection").[2]
- The definition of local stations has been revised.

Here I discuss only these *changes* in the way the audience share equations were estimated. For a comprehensive description of the new application of the estimation method, see Park (forthcoming). For the old application, see Park (1979a).

Correction of Keypunch Errors

While getting the data ready for the new estimates, the FCC staff and I discovered and corrected a few errors:

- Three station call signs were mispunched with the result that one station looked like two different stations, one received off the air and one on the cable. Example: The cable observation for WLOX in county 10 was punched as WLDX.
- Six parent and satellite pairs were not combined in the data. Example: In county 7, data for KARD and its satellite KCKT are combined in the new data, but not in the old.
- Three affiliation codes were incorrectly punched with the result that an independent station was counted as a network affiliate. Example: KTVT in county 21, an independent station, had affiliation code 200 in the old data, indicating affiliation with CBS.

These substantive corrections have very little effect on the resulting estimates. In addition, a few other (non-substantive) errors that have no effect at all on the estimates were corrected. The corrected data are reproduced in full in a companion note (Park, 1979b).

Separate Equations for Different Parts of the Day

In (1979a), I estimated final (second-stage) equations for the full-day and prime-time time periods only. The equations for the other time periods may well be substantially different. We know, for example, that independent stations typically attract larger audience shares during the early fringe time period than they do during the rest of the day. Consequently, I now estimate final equations for all five time periods.

Nonduplication Protection

In my earlier work I made no distinction between distant network stations whose programs are blacked out on the cable when they duplicate those of a local station, and

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[1] See Appendix B for definitions.

[2] Nonduplication protection is available on request to stations located within 35 miles of a cable system (or within 55 miles for stations in below-100 markets). If asked to do so, the cable system must delete programs broadcast by any lower priority station, when those programs duplicate those of the requesting station. See *Cable Television Regulations*, Subpart E for details.

those that are never blacked out. In fact, of course, one expects their audience shares to be quite different. Those that are blacked out should have small shares, if only because they are carried only part of the time. Those that are not blacked out should have larger shares. They compete with local stations throughout the day and may in some cases supply popular network programming that is not even carried by local stations (for example, in a two-station market).

Consequently, I distinguish between distant network stations that are blacked out and those that are not in my new estimates and estimate "attractiveness indices" (defined below) for the following station types:

NVL: local network VHF

NUL: local network UHF

IVL: local independent VHF

IUL: local independent UHF

NVD: distant network VHF not blacked out

NUD: distant network UHF not blacked out

NVDB: distant network VHF blacked out

NUDB: distant network UHF blacked out

IVD: distant independent VHF

IUD: distant independent UHF.

Definition of Local Stations

As before, the audience share equations are estimated using observations on local stations only—all such stations in 121 counties.[1] The set of stations considered to be local is slightly different, however. Before, local stations were all those assigned to the ADI[2] market of which the county is a part, and distant stations were stations from other markets. The new definition is the same with two exceptions. Stations are counted as local if they receive nonduplication protection against some other station, and they are counted as distant if they are blacked out to provide nonduplication protection to some other station, regardless of whether the county is in their ADI or not.

Table 1 shows the number of stations (VHF and UHF combined) in the various categories. Of the 334 stations (105 + 216 + 13) that would have been counted as local network stations under the old definition, 13 are now excluded because they are sometimes blacked out. On the other hand, 14 stations previously counted as distant are now defined as local, since they receive nonduplication protection.

Many more distant stations are received on the cable than off the air—nearly twice as many network stations and over eight times as many independents. The distant network stations are fairly evenly divided between those that are sometimes blacked out and those that are not.

Revised Audience Share Equations

As in (1979a), I hypothesize that each station type can be assigned an attractiveness index a_i such that the audience tends to divide among available signals in proportion to

[1] An "observation" consists of the local station's audience share together with information on the competition (both local and distant) that it faces.

[2] Area of dominant influence, defined by ARB to be all those counties in which a market's stations attract a plurality of viewing hours.

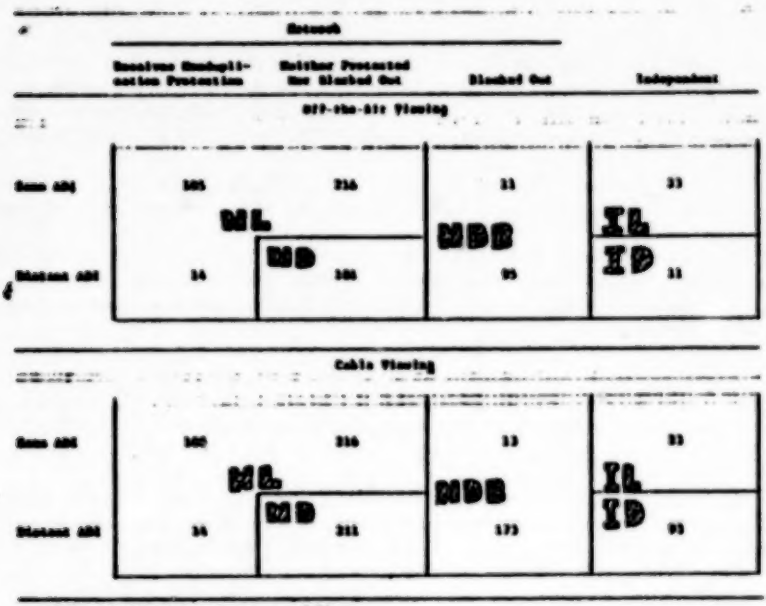
$a_i/\Sigma a_i$, where the summation is over all of the available signals. I allow the attractiveness indices to differ off the air and on the cable. In particular, I expect them to be higher on the cable for local UHF stations and for all distant stations, because of improved reception on the cable. Thus the model is

$$\text{and} \qquad \begin{aligned} SHR_{oa} &= \Sigma a_{oj} D_{ij} / \Sigma a_{oj} M_{oj} + u_{oa} \\ SHR_{ca} &= \Sigma a_{cj} D_{ij} / \Sigma a_{cj} M_{cj} + u_{ca}, \end{aligned} \qquad (1)$$

where the summations are over the 10 station types, D_{ij} is a dummy variable equal to 1 if the i^{th} station is of type j and 0 otherwise, and J_{oj} and M_{oj} are the numbers of available signals of type j off the air and on the cable, respectively.

Table 1

COUNTS OF STATIONS OF DIFFERENT TYPES



NOTES: Station categories are as follows:

NL: Local network
ND: Distant network not blacked out
NBO: Distant network blacked out
IL: Local independent
ID: Distant independent

I estimate the audience share equations by a two-stage procedure; see Park (forthcoming) for details. First-stage nonlinear regressions (Appendix Table A.1) provide estimates of the parameters of the co-variance matrix. These are then used in a nonlinear, nondiagonally weighted regression to obtain second-stage generalized least squares estimates of the attractiveness indices (Appendix Table A.2).

The precision of the estimates can be increased by constraining the model. As before, I assume that cable increases the attractiveness of local UHF stations, both network and independent, by the same multiple, K. That is, if the off-the-air indices are a_{NUL} and a_{IUL}, the cable indices are $K(a_{NUL})$ and $K(a_{IUL})$.

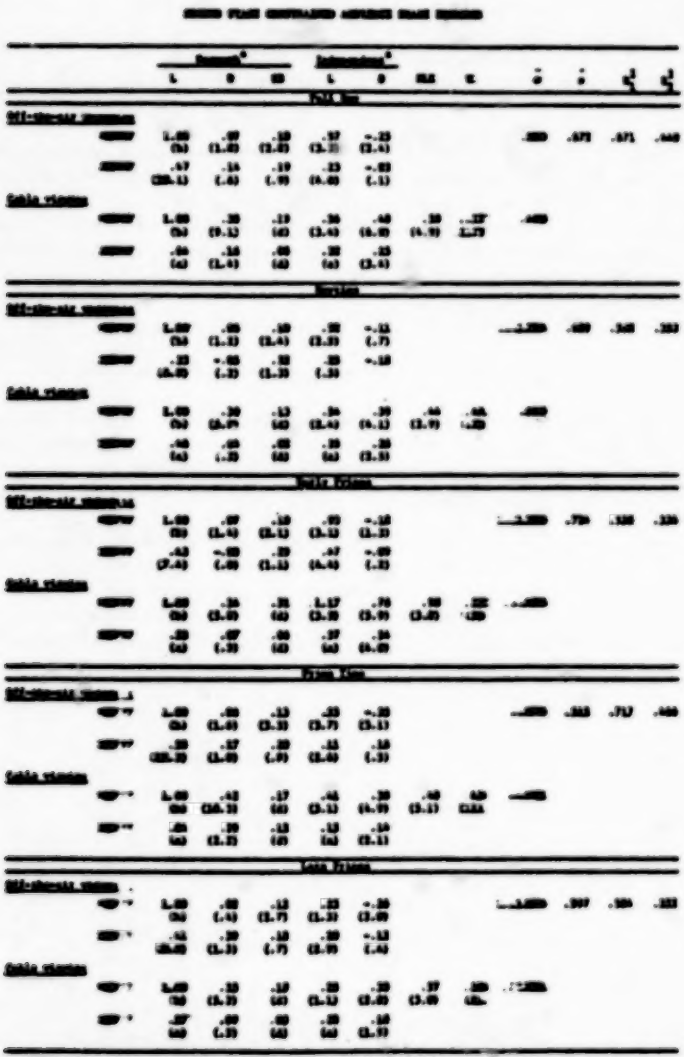
In addition, I assume that being blacked out part of the time on the cable reduces the attractiveness of distant network stations, both VHF and UHF, by the same multiple, BLK. That is, if the cable indices for stations that are not blacked out are a_{NVD} and a_{NUD}, then for those that are blacked out $a_{NVDB} = BLK(a_{NVD})$ and $a_{NUDB} = BLK(a_{NUD})$.

The constrained estimates are shown in Table 2. Both the K constraint and the BLK constraint are acceptable hypotheses (using an F test at the .05 level) in all time periods.

Local UHF stations have higher indices on the cable than they do off the air, undoubtedly because reception is improved by cable. The improvement factor K is quite precisely estimated; it differs somewhat from one time period to another, ranging up to 1.45 in prime time.

Stations blacked out to provide nonduplication protection have lower indices on the cable than do stations that are not blacked out. The blackout factor BLK ranges from .40 in prime time when there is a lot of duplication to .90 in early fringe when there is very little.

The estimated attractiveness indices are for the most part in accord with prior expectations. Local stations handicapped by lack of network affiliation or by UHF transmission have lower indices than do network VHF stations; independent UHF stations, which suffer from both handicaps and which, in addition, often broadcast weaker programs than do VHF independents, have the lowest indices of all local stations.



The indices for distant stations off the air do not convey much information, because they are highly reception-dependent. They depend mostly on how close out-of-market stations happen to be to our sample counties. The estimated negative indices for some such stations are anomalies, but not very important ones. I do not use these values in the application of the model. Furthermore, when I reestimated the equations with all indices constrained to be non-negative, the other coefficients changed very little (Appendix Table A.3).

Distant stations on the cable generally have smaller indices than do comparable local stations. The index for distant network VHF stations not blacked out is quite precisely estimated to be between 30 and 42 percent of that of local VHF network stations in the different time periods. The index for distant independents (both VHF and UHF) tends to be about 75 percent of the index for their local counterparts. Indices for distant UHF stations on the cable are always smaller than those for comparable VHF stations, presumably reflecting less attractive programming on the UHF stations, and also perhaps residual picture quality differences even on the cable.

Revised Audience Diversion Projections

Tables 3 and 4 use the new audience share equation for the full day time period to simulate the effect of cable on local station audience in 10 hypothetical markets, clustered to represent top-50, second-50, and below-100 market conditions. For each hypothetical market, I show the effect of three different distant signal packages:

- Those allowed by existing rules. This varies depending on market rank and the number of stations in the market. Neglecting specialty and noncommercial stations, the maximum numbers are three independents in top-50 markets with no independents of their own, and two networks in markets with only one local network station. The actual numbers for each hypothetical market are the first of the three distant signal lineups shown in the tables.

Table 3

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	102-103	98- 99
				0	0	4	11	96- 97		96- 97	99-100	96- 97
				0	3	4	11	96- 96		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		97- 98	102-104	97- 98
				0	0	4	16	93- 95		93- 94	97- 99	93- 95
				0	3	4	16	92- 94		92- 94	96- 97	93- 94
3	0	0	2	0	0	2	8	98- 99			101-102	98- 99
				0	0	4	8	96- 97			98- 99	96- 97
				0	3	4	8	95- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	4	20	90- 92				90- 92
				0	3	4	20	89- 91				89- 91
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 96	100-101			95- 97
				0	0	5	18	90- 92	94- 98			91- 93
				0	3	5	18	89- 91	93- 94			90- 91
2	0	0	0	1	0	2	24	90- 92				90- 92
				1	0	5	24	86- 88				86- 88
				1	3	5	24	85- 87				85- 87
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 99				96- 99
				0	0	4	29	89- 92				89- 92
				0	3	4	29	87- 89				87- 89
1	1	0	0	1	0	1	31	87- 89	94- 97			89- 92
				1	0	4	31	80- 82	85- 87			81- 84
				1	3	4	31	78- 80	82- 85			79- 82
1	0	0	0	2	0	1	41	77- 80				77- 80
				2	0	4	41	70- 72				70- 72
				2	3	4	41	68- 70				68- 70

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 4

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		95- 98	105-107	96- 99
				0	0	6	27	90- 92		90- 92	98-100	91- 93
				0	3	6	37	85- 88		85- 88	95- 98	86- 89
3	0	1	1	0	0	2	26	95- 97		94- 96	104-106	95- 97
				0	0	6	30	87- 90		87- 89	95- 98	88- 90
				0	3	6	37	82- 85		82- 85	91- 94	83- 85
3	0	0	2	0	0	2	27	93- 96			103-105	95- 97
				0	0	6	30	86- 89			94- 96	87- 90
				0	3	6	38	80- 83			89- 92	82- 84
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	84- 87				84- 87
				0	3	6	43	78- 81				78- 81
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 96				94- 96
				0	0	5	31	86- 89				86- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 93	99-102			92- 95
				0	0	5	36	82- 85	90- 92			84- 86
				0	3	5	45	75- 78	83- 86			76- 79
2	0	0	0	1	0	2	48	81- 85				81- 85
				1	0	5	51	71- 74				71- 74
				1	3	5	62	62- 65				62- 65
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 99				97- 99
				0	0	4	31	89- 91				89- 91
				0	3	4	39	82- 85				83- 85
1	1	0	0	1	0	1	52	78- 82	90- 95			82- 86
				1	0	4	57	64- 68	73- 77			67- 71
				1	3	4	67	55- 59	64- 68			58- 62
1	0	0	0	2	0	1	74	59- 63				59- 63
				2	0	4	76	43- 48				45- 48
				2	3	4	83	37- 39				37- 39

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

- A larger number of stations that might be carried if the present rules regarding independent signal carriage were relaxed. In actuality, this number will depend on the system operators' perceptions of how many new subscribers an additional distant station would attract, compared with the cost of importing the additional station. I simply assume that the number is six in top-50 markets,[1] five in the second-50 markets, and four in below-100 markets.

- All of the above plus additional stations that might be carried if rules regarding carriage of network signals were also relaxed. My assumption here is that a full complement of three duplicate distant networks would be carried in all markets in addition to those allowed by current rules.

I use attractiveness indices estimated for distant VHF stations on the cable for all distant signals.[2] To the extent that less attractive UHF stations are actually carried, my projections may tend to overstate the actual diversion due to cable.

Near-term projections for each of the resulting 30 cases are shown in Table 3, and Table 4 shows long-term projections. The near-term projections are based on present cable penetration levels in markets of each type. The long-term projections are based on (usually much higher) ultimate equilibrium penetration levels estimated in Park (1971).[3] These are in all likelihood conservative estimates of cable penetration for the market as a whole; that is, they probably overstate the penetration actually to be expected, and hence overstate the potential audience diversion due to cable. The reason is that the equation is a system penetration equation, not a market penetration equation. It explains the fraction of homes passed by cable that subscribe, not the fraction of all homes in the market. Hence to the extent that some portions of the market remain unwired, I would expect average penetration in the market as a whole to fall short of the values shown.

The projections show the audience if there is cable in the market, as a percentage of the audience if there is no cable. In all cases, I show a range of values. The lower end of the range is calculated assuming that cable does not lead to increased TV viewing—households that subscribe to cable if it exists would watch as much TV if cable did not exist. The upper end of the range assumes that cable does result in increased viewing, which partially offsets the diversion of audience to distant signals.

In the larger (three-network) markets, projected audience diversion in the near term is minimal—6 percent or less under present regulations, and 13 percent or less under the most relaxed regulations. In smaller markets (fewer than three networks), projected diversion ranges from 8 to 23 percent currently. The maximum projected diversion is 32 percent for a single station market under relaxed regulations. In all cases, UHF stations are not hurt as much by cable as are VHF stations; in some instances, they may actually be helped.

Long-term diversion patterns are similar to the short-term patterns, but the magnitudes are larger. Projected diversion ranges up to 24 percent in markets with three

[1] This corresponds to the assumption in Schink and Thanawala (1978).

[2] Specifically, I use .38 for primary network signals (which are not blacked out), .19 for duplicate network signals (which are), and .40 for independents.

[3] I assume price of cable service equals $90 per year, median family income equals $16,000 per year, and UHF set penetration equals 100 percent, all approximating current values. Color set penetration is set equal to .5, approximately the mean value in the sample used to estimate the equation, since the coefficient on the color set variable was completely insignificant in the estimated equation. For each market situation, I calculate penetration at the center of the market and penetration halfway out to the B-contour, and average the two figures to obtain the estimates shown in the table for the market as a whole.

network stations under the most relaxed cable regulations, and much higher than that in markets with only one or two stations.

There is reason to believe that my projections substantially overstate the amount of diversion in small markets. The reason is that the projections assume that everyone would watch local stations if there were no cable. This is a fairly good approximation in most large markets, but not in many smaller markets where stations from adjacent markets attract substantial audiences off the air. Indeed, a study by the National Cable Television Association (1978) shows that audience diversion off the air is almost as large as it is on the cable in many of the markets that it studied. On this ground, the effect of cable may be much smaller than shown in Tables 3 and 4 for many small markets.

III. Discussion of Industry Criticisms

I find the following major criticisms in the industry comments on my earlier work.

1. There are problems with the data ". . . primarily related to the 'local' versus 'distant' definition." (*Joint Motion*, pp. 12–15; also Association of Independent Television Stations, pp. 17–20).

2. Failure to consider differences in diversion during different times of the day (*Joint Motion*, pp. 17–19; Fisher, pp. 1–3; Charles River Associates, passim).

3. The total audience equation is unreliable, and the overall results are quite sensitive to how total audience is treated (Fisher, pp. 3–14).

4. Failure to distinguish between additional network *stations* and additional network *programs* (Fisher, pp. 14–15).

5. Failure to account for differences in reception quality in different parts of a county (Fisher, pp. 15–17).

6. Failure to account for differential effect of additional distant independent signals on local independents (Fisher, p. 17; also Schink, passim).

I shall discuss each of these criticisms in turn in the light of the revised estimates presented in the preceding section of this Note.

Data Problems

The *Joint Motion* (p. 14) refers to ". . . serious problems with the data for 35 of the 121 counties . . ." and then goes on to specify the "problems" in 14 of the 35. In one county, the problem is a key punch error that has been corrected in the data used for the revised estimates in this Note. In two others, the "problem" is that all reportable stations are local; the *Joint Motion* incorrectly claims that such counties contribute nothing to the analysis. In fact, they contribute to the estimates of the error covariance matrix, which plays a central role in my generalized least squares analysis.

In the 11 other listed counties, the "problem" is that one local station (or in one case, two local stations) has no off-the-air audience.[1] In the revised data, there are 15 local commercial stations (out of 358 total) in 13 counties with off-the-air NWC[2] equal to zero.[3]

The *Joint Motion* seems to maintain that zero off-the-air audience is by itself reason to

[1] In two of these counties, the offending station is no longer considered to be local by the definition used for the revised data; see Section II above.

[2] NWC is net weekly circulation, the percent of TV households that watches the station at least once a week.

[3] The 15 stations include three VHF and six UHF network affiliates, and six UHF independents.

exclude a station from the sample. That contention is false. It is a fact of life that some stations get little or no audience in some parts of their own markets. One of the benefits of cable is that it improves reception so that these stations can attract some audience in previously dead areas.[4]

However, zero off-the-air audience *may* serve as a warning that some of these stations are not representative of the relatively close-in areas that we want to draw inferences for. To check this, I measured the approximate distance from the station's assigned city to the principal city of the county, for each of the stations with zero NWC. The results are shown in Table 5.

Table 5

Approximate Distance From Sample Counties
To Stations With Off-The-Air NWC
Equal to Zero

County	Station	Type	Distance
5	KGSC	IU	0
5	KDTV	IU	0
29	WHTV	NU	30
90	KLAA	NU	30
41	WHAE	IU	40
157	KXTX	IU	45
47	WYEA	NU	50
4	KLAA	NU	55
47	WHAE	IU	65
147	WZTV	IU	65
60	KMEG	NU	70
87	WTVK	NU	70
142	KXON	NV	70
140	KXON	NV	95
18	KXON	NV	125

The *Joint Motion* singled out for special discussion KXON in county 18, 125 miles distant. There is certainly a strong case for considering this not to be typical of relatively close-in portions of a market. In contrast are the two San Francisco UHF independents which have zero reported NWC *in their home county*. There is no question but that these are local stations, and there is no reason to exclude them from the sample just because they have no off-the-air audience. In between, the question of which stations ought to be included and which excluded is a matter of judgment. The advantage of including stations (at least up through WZTV at 65 miles) is that it bolsters a sample that is in any case somewhat thin in independent stations. The advantage of excluding stations (down through WHAE at 40 miles) is that it reduces the extent to which the observations are atypical of the 35-mile zone which we are particularly interested in.

Anyhow, I checked the effect of excluding *all* of the stations with off-the-air NWC equal to zero, and found it to be small. In the reduced sample, there are no observations for these stations, nor are they counted among the competing stations received off-the-air.[1] The second-stage constrained share equation for the full-day time period is in

[4] Thus the contention of Independent Television Stations (1979, p. 18) that the effect of cable should be measured so as to *exclude* the effect of improved reception is difficult to understand. To exclude improved reception would be to exclude an important real effect.

[1] All of them are carried and attract positive audience on the cable, so they count among competing stations on the cable.

Appendix Table A.4. Audience diversion projections based on these estimates are shown in Tables 6 and 7. Excluding these stations makes very little difference to the projections, and what difference there is, is usually in the direction of *less* diversion.

I cannot discuss the "problems" in the other 24 counties, since the *Joint Motion* failed to identify them.

Table 6

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Using Attractiveness Indices Estimated with Sample That Excludes Local Stations with Off-the-Air HUC Equal to Zero

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	101-102	99-100
				0	0	6	11	96- 97		96- 97	99-100	97- 98
				0	3	6	11	96- 97		96- 97	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 99		97- 98	101-103	97- 99
				0	0	6	16	94- 95		93- 95	97- 98	94- 95
				0	3	6	16	93- 94		93- 94	96- 97	93- 94
3	0	2	2	0	0	2	8	98- 99			100-101	98- 99
				0	0	6	8	96- 97			98- 99	96- 97
				0	3	6	8	96- 96			97- 98	96- 97
3	0	0	0	0	0	3	20	94- 96				94- 96
				0	0	6	20	91- 92				91- 92
				0	3	6	20	89- 91				89- 91
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 95				93- 95
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	95- 96	99-101			96- 97
				0	0	5	18	91- 93	94- 96			92- 93
				0	3	5	18	90- 91	93- 94			90- 92
2	0	0	0	1	0	2	24	91- 93				91- 93
				1	0	5	24	87- 88				87- 88
				1	3	5	24	85- 87				85- 87
Below-100 Markets												
3	0	0	0	0	0	1	29	97- 99				97- 99
				0	0	4	29	90- 92				90- 92
				0	3	4	29	88- 90				88- 90
1	1	0	0	1	0	1	31	87- 90	94- 96			89- 92
				1	0	4	31	81- 83	83- 88			82- 85
				1	3	4	31	79- 81	83- 85			80- 82
1	0	0	0	2	0	1	41	77- 80				77- 80
				2	0	4	41	70- 73				70- 73
				2	3	4	41	68- 71				68- 71

[a] Average permanent penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audiences over the full broadcast day. The base (100 percent) is the audiences if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 7

LONG-TERM EFFECT OF [illegible] ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATIONS
Using Attractiveness Indices Estimated with Sample Data:
Excludes Local Situations with Off-the-Air BHC Equal to Zero

Network		Independent		Distant Situations			Cable Penetration[a]	Index of Local Audience[b] If Cable Extends				
				Prim. Netw.				Network		Independent		
VHF	UHF	VHF	UHF	Net.	Netw.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	3	2	25	96- 99		96- 98	[illegible]	97- 99
				0	3	6	27	91- 93		90- 93	[illegible]	92- 94
				0	3	6	37	87- 90		84- 89	[illegible] 97	87- 90
3	0	1	1	0	3	2	26	95- 98		94- 97	[illegible]	96- 98
				0	3	6	38	88- 91		88- 90	[illegible] 97	89- 91
				0	3	6	37	83- 86		83- 85	[illegible] 93	84- 87
3	0	0	2	0	3	2	27	94- 96			[illegible]	95- 98
				0	3	6	38	87- 90			[illegible] 95	88- 91
				0	3	6	38	82- 85			[illegible] 92	83- 86
3	0	0	0	0	3	3	30	92- 94				92- 94
				0	3	6	32	85- 88				85- 88
				0	3	6	43	79- 82				79- 82
Second-50 Markets												
3	0	0	0	0	3	2	29	94- 97				94- 97
				0	3	5	31	87- 90				87- 90
				0	3	5	41	81- 84				81- 84
2	1	0	0	0	3	2	32	91- 94	99-101			93- 95
				0	3	5	36	83- 86	90- 93			85- 87
				0	3	5	45	76- 79	83- 87			78- 81
2	0	0	0	1	3	2	48	82- 86				82- 86
				1	3	5	51	72- 75				72- 75
				1	3	5	62	63- 67				63- 67
Below-100 Markets												
3	0	0	0	0	3	1	26	97- 99				97- 99
				0	3	4	31	89- 92				89- 92
				0	3	4	39	83- 86				83- 86
1	1	0	0	1	3	1	32	79- 83	89- 94			83- 87
				1	3	4	37	66- 69	74- 77			69- 72
				1	3	4	47	57- 60	63- 68			60- 63
1	0	0	0	2	3	1	74	60- 64				60- 64
				2	3	4	76	46- 49				46- 49
				2	3	4	83	36- 40				36- 40

[a] Eventual equilibrium penetration when the whole market is wired, recommended using equation (*) in Fort (1971, p. 237).

[b] Average audience over the [illegible] broadcast day. The base (100 percent) is the audience if cable does not [illegible]; it assumes that all the audiences consume local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Conclusion

Some of the data problems identified in the industry comments are not problems at all. Others are, and have been corrected. Still others may or may not be, but they make very little difference to the audience diversion projections.

Different Effects of Audience Diversion In Different Time Periods

The audience share equations in Table 2 strongly support the industry contention that shares differ significantly by day part. In particular, attractiveness indices for independent stations on the cable—VHF and UHF, local and distant—are substantially larger during the early fringe time period than they are at other times of the day. This raises two questions about my audience diversion projections in Tables 3 and 4, which are based on the full-day equation only.

1. Would the projections differ if they were based on audience diversion calculated separately for the individual day parts?

2. An excellent brief econometric study by Charles River Associates (1979) shows quite convincingly that audience during different time periods has different effects on stations' revenue. Another study using an accounting approach (Roger Cooper and Associates, undated) reaches the same conclusion.[1] If these differences were taken into account, would the effect of cable on local station *revenue* differ from its effect on local station audience?

The answer to the first question is no; composite audience diversion projections built up from the four individual time period equations[1] differ only slightly from those based directly on the full-day equation. These composite projections are in Appendix Tables

[1] The two studies differ markedly as to the relative value of the different time periods to independent stations, however. Charles River Associates concludes that audience during prime time and late fringe is of no value at all to independents; whereas Roger Cooper and Associates (who study only independents) find that these two time periods are *more* valuable than the others are.

[1] The four time periods (daytime, early fringe, prime time, and late fringe) exclude 33 weekend hours that are included in the 140 weekly hours for the full-day time period—see Appendix B. Thus, strictly speaking, the two sets of projections are not quite comparable. However, the effect of this discrepancy is certainly very small.

A.5 and A.6.[2]

The answer to the second question, surprisingly, is also no; using the revenue weights estimated by Charles River Associates or Roger Cooper and Associates[1] similarly has little effect on the projections. The revenue projections based on separate time period audience diversion projections and separate values of audience in the different time periods are shown in Tables 8 and 9 (Charles River weights) and Tables 10 and 11 (Roger

[2] As an example of how the calculations are done, consider the effect of cable on audience share for the station shown on the very last line of Table A.5. (The effect on share is the same as the effect on audience assuming that the self-selection hypothesis is true.) The calculations are summarized in the following table:

Period	Hours Per Week	Share O	Share C	Fraction of TVH O	Fraction of TVH C	Homes Using TV O	Homes Using TV C	Hours O	Hours C	Hours C*	Total Hours Without Cable	Total Hours With Cable
F	140.0	1.	.255	.59	.41	.287	.313	23.71	17.5		41.68	28.29
D	47.5	1.	.282	.59	.41	.210	.339	5.89	[illegible]	[illegible]	10.54	7.20
E	15.0	1.	.177	.59	.41	.414	.426	3.66	[illegible]	.46	6.28	4.12
P	24.5	1.	.282	.59	.41	.596	.628	8.62	6.81	1.78	14.98	10.40
L	20.0	1.	.292	.59	.41	.153	.178	1.81	1.46	.43	3.27	2.24
Composite	107.0										35.02	23.96

The off-the-air (O) and cable (C) shares are calculated using the equations in Table 2. Cable penetration is assumed to be .41; this corresponds to a somewhat larger fraction of audience because the fraction of homes using TV is higher in cable households than it is in off-the-air households. Hours (O) that off-the-air households watch the local station is calculated as the product of hours per week in the time period and off-the-air (O) values for share, fraction of TVH, and homes using TV. Hours (C) that cable households watch the local station is similarly calculated using corresponding cable (C) values. C * is hours that cable households would watch the local station if they did not have cable. It is calculated in the same way as cable hours (C) except using off-the-air (O) shares. The total hours that the local station is watched if there is no cable is the sum of hours (O) and hours (C *); total hours if there is cable is the sum of hours (O) and hours (C). These sum to 35.02 and 23.96, respectively, for the four time periods. Thus the effect of cable is to reduce local station viewing hours to 68 percent of what they would have been without cable. This is the smaller of the two composite estimates shown in Table A.5; it is just the same as the corresponding estimate based on the full-day equation in Table 3.

[1] Specifically, the weights from the second equation in the table following p. 5 for network affiliates, and from the second equation in the table following p. 6 for independents, Charles River Associates (1979); and the weights for all 12 stations, Roger Cooper and Associates (undated, p. 2):

Time Period	Charles River Associates Affiliates	Charles River Associates Independents	Roger Cooper and Associates Affiliates	Roger Cooper and Associates Independents
Daytime	-27.87	153.88	—	50
Early Fringe	287.70	401.51	—	121
Prime Time	198.06	27.46	—	147
Late Fringe	517.40	-174.76	—	173

In estimating the equations, Charles River Associates added weekend hours not counted by ARB in any of the four individual time periods (see footnote above, p. 22) to the daytime time period. Again, this discrepancy in treatment certainly has only a negligible effect on my results.

Cooper weights for independents, Charles River weights for affiliates).[2] For the most part, any differences between these revenue projections and the audience projections in Tables 3 and 4 are no larger than one percentage point. The exception is projections for UHF independents using Charles River weights. With audience as the metric, these stations were helped by cable, or at worst, hurt less than VHF stations. Their projected revenues, however, are reduced by about the same amount as are those of VHF stations. This result is, however, dependent on the choice of Charles River weights. Revenue projections using Roger Cooper weights are almost the same as the audience projections in Tables 3 and 4.

[2] The calculations are a straightforward extension of those for Appendix Tables A.5 and A.6 described in the footnote above. Pursuing the example of the station on the very last line of Table A.5 (and Table 8), the calculations start where those previously described leave off:

Time Period	Total Hours		Revenue Weights	Total Revenue	
	Without Cable	With Cable		Without Cable	With Cable
F	41.68	28.29	129.14	5341	3625
D	10.54	7.20	-27.87	-294	-201
E	6.28	4.12	297.70	1807	1185
P	14.98	10.40	196.06	2967	2060
L	3.27	2.24	517.40	1692	1159
Composite	35.02	23.96		6162	4208

Multiplying total hours by the Charles River Associates revenue weights gives total revenue with and without cable in existence. Summing revenue over time periods, we find that the effect of cable is to reduce local station revenue to 68 percent of what it otherwise would have been--just the same as its effect on aggregate audience.

Table 8

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION REVENUE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Composite Estimates Based on Audience Share Equations for Four Time Periods and Using Charles River Associates Revenue Weights

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	[illegible]
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		99- 99	100-100	99-[illegible] 99
				0	0	4	11	96- 97		96- 97	97- 98	96-[illegible] 97
				0	3	4	11	96- 97		96- 96	97- 97	96-[illegible] 97
3	0	1	1	0	0	2	16	97- 98		98- 98	99- 99	97-[illegible] 98
				0	0	4	16	94- 95		93- 94	94- 95	94-[illegible] 95
				0	3	4	16	93- 94		92- 93	93- 94	93-[illegible] 94
3	0	0	2	0	0	2	8	98- 99			99-100	98-[illegible] 99
				0	0	4	8	96- 97			96- 97	96-[illegible] 97
				0	3	4	8	96- 96			96- 96	96-[illegible] 96
3	0	0	0	0	0	3	20	94- 95				94-[illegible] 95
				0	0	4	20	90- 92				90-[illegible] 92
				0	3	4	20	89- 90				89-[illegible] 90
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 97				96-[illegible] 97
				0	0	3	17	93- 94				93-[illegible] 94
				0	3	3	17	92- 93				92-[illegible] 93
2	1	0	0	0	0	2	18	94- 95	100-101			95-[illegible] 97
				0	0	3	18	91- 92	95- 96			92-[illegible] 93
				0	3	3	18	89- 91	93- 95			90-[illegible] 92
2	0	0	0	1	0	2	24	91- 92				91-[illegible] 92
				1	0	3	24	86- 88				88-[illegible] 89
				1	3	3	24	85- 86				85-[illegible] 86
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 98				96-[illegible] 98
				0	0	4	29	89- 91				89-[illegible] 91
				0	3	4	29	87- 89				87-[illegible] 89
1	1	0	0	1	0	1	31	87- 89	95- 97			89-[illegible] 91
				1	0	4	31	80- 82	86- 88			82-[illegible] 85
				1	3	4	31	78- 80	83- 85			80-[illegible] 82
1	0	0	0	1	0	1	41	77- 79				77-[illegible] 79
				1	0	4	41	70- 72				70-[illegible] 72
				1	3	4	41	68- 70				68-[illegible] 70

[a] Average present penetration in markets of each type. Data supplied by [illegible] Bureau.

[b] The base (100 percent) is the revenue if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 9

LONG-TERM EFFECT OF CABLE ON LOCAL STATION REVENUE IN REPRESENTATIVE MARKET/NUMBER PRESENT AND POTENTIAL DECLARED CABLE PENETRATION
Comparison of Estimates Based on Audience Share Equations for Four Time Periods and Using Charles River Associates Revenue Weights

Network		Independent		Effective Stations			Cable Penetration[a]	Index of Local Station Audience[b] Where Cable Exists				
					Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Perfect Comp.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	5 0	0	2	25	[illegible]		[illegible]	99-100	97- 98
				3 0	0	4	27	[illegible]		[illegible]	92- 94	91- 93
				3 0	3	4	37	[illegible]		[illegible]	88- 90	86- 88
3	0	1	1	3 0	0	2	26	[illegible]		[illegible]	98- 99	95- 97
				4 0	0	4	30	[illegible]		[illegible]	89- 90	88- 90
				3 0	3	4	37	[illegible]		[illegible]	84- 86	83- 85
3	0	0	2	5 0	0	2	27	[illegible]			97- 99	94- 96
				3 0	0	4	30	[illegible]			88- 89	87- 89
				3 0	3	4	38	[illegible]			82- 84	81- 83
3	0	0	0	5 0	0	2	30	[illegible]				91- 93
				3 0	0	4	32	[illegible]				85- 87
				3 0	3	4	43	[illegible]				78- 80
Second-50 Markets												
3	0	0	0	5 0	0	2	29	[illegible]				94- 95
				3 0	0	3	31	[illegible]				87- 89
				3 0	3	3	41	[illegible]				80- 83
2	1	0	0	5 0	0	2	32	[illegible]	100-102			92- 94
				3 0	0	3	36	[illegible]	91- 93			84- 86
				3 0	3	3	45	[illegible]	84- 87			77- 79
2	0	0	0	1 1	0	2	48	[illegible]				81- 84
				1 1	0	3	51	[illegible]				71- 74
				1 1	3	3	62	[illegible]				62- 65
Below-100 Markets												
3	0	0	0	5 0	0	1	26	[illegible]				97- 98
				3 0	0	4	31	[illegible]				89- 91
				3 0	3	4	39	[illegible]				82- 85
1	1	0	0	1 1	0	1	52	[illegible]	91- 94			82- 86
				1 1	0	4	57	[illegible]	75- 78			68- 71
				1 1	3	4	67	[illegible]	64- 68			59- 62
1	0	0	0	2 2	0	1	74	[illegible]				59- 63
				2 2	0	4	76	[illegible]				45- 48
				2 2	3	4	83	[illegible]				37- 39

[a] Eventual equilibrium penetration when the common market is ventured, calculated using equation (*) in Rep. [illegible], p. 27).

[b] The base (100 assumed) is the revenue if cable does not exist; it assumes that all the audience enhance local stations in the absence of cable (that is, there are no overlapping programs from adjacent markets..

Table 10

SHORT-TERM EFFECT OF CABLE ON LOCAL STATION REVENUES IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL EXPANDED CABLE REGULATION
Composite Estimates Based on Audience Regression Equations for Four Time Periods Using Roger Cooper and Associates Revenue Weights

Network		Independent		Displacement Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Retransmitted				
				Primary	Dupl.			Commercial		Independent		Educational
VHF	UHF	VHF	UHF	Loc.	Net.	Ind.		VHF	UHF	VHF	UHF	
Top-30 Markets												
3	0	3	2	C	0	2	11	0- 99		98- 98	101-10	99
				C	0	6	11	0- 97		96- 96	99- 9	97
				C	3	6	11	0- 97		95- 96	98- 9	97
3	0	1	1	C	0	2	16	0- 98		96- 97	101-10	98
				C	0	6	16	0- 95		93- 94	96- 9	95
				C	3	6	16	0- 94		92- 93	95- 9	94
3	0	0	2	C	0	2	8	0- 99			100-10	99
				C	0	6	8	0- 97			98- 9	97
				C	3	6	8	0- 96			97- 9	96
3	0	0	0	C	0	3	20	0- 95				95
				C	0	6	20	0- 92				92
				C	3	6	20	0- 90				90
Second-50 Markets												
3	0	0	0	C	0	2	17	0- 97				97
				C	0	5	17	0- 94				94
				C	3	5	17	0- 93				93
2	1	0	0	C	0	2	18	0- 95	98-101			97
				C	0	5	18	0- 92	95- 96			93
				C	3	5	18	0- 91	92- 95			91
2	0	0	0	L	0	2	24	0- 92				92
				L	0	5	24	0- 88				88
				L	3	5	24	0- 86				86
Below-120 Markets												
3	0	0	0	C	0	1	29	0- 98				98
				C	0	4	29	0- 91				91
				C	3	4	29	0- 89				89
1	1	0	0	L	0	1	31	0- 89	98- 97			91
				L	0	4	31	0- 82	88- 88			84
				L	3	4	31	0- 80	88- 85			82
1	0	0	0	L	0	1	41	0- 79				79
				L	0	4	41	0- 72				72
				L	3	4	41	0- 70				70

[a] Eventual equilibrium penetration when the whole community is wired, calculated using equation (*) in Fortner (1971, p. 37).

[b] The index (100 percent) is the revenue if cable does not exist; it assumes that all the audience watches local stations in the community of cable (that is, there are no overlapping audiences from adjacent markets).

Table 11

LONG-TERM EFFECT OF [illegible] LOCAL STATION REVENUE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELATED CABLE REGULATION
Composite Estimates Based on Audience Share Equations for Hour Time Periods and Ranges Kept Cooper and Associates Revenue Impacts

Network		Independent		Distant Stations Carried			Cable Penetration[a]	Index of Local Television Audience[b] If Cable Eliminated				Total
								Network		Independent		
VHF	UHF	VHF	UHF	Prim. affil.		Ind.		VHF	UHF	VHF	UHF	
Top-30 Markets												
3	0	3	2	0		2	25	96- 98		95- 96	[illegible]	96- 98
				0		6	27	91- 93		89- 91	[illegible]	91- 93
				0		6	37	86- 88		84- 86	[illegible]	86- 88
3	0	1	1	0		2	26	95- 97		93- 95	[illegible]	95- 97
				0		6	30	88- 90		87- 88	[illegible]	88- 90
				0		6	37	83- 85		81- 83	[illegible]	83- 85
3	0	0	2	0		2	27	94- 96			[illegible]	94- 96
				0		6	30	87- 89			[illegible]	87- 89
				0		6	38	81- 83			[illegible]	82- 84
3	0	0	0	0		3	30	91- 93				91- 93
				0		6	32	85- 87				85- 87
				0		6	43	78- 80				78- 80
Second-30 Markets												
3	0	0	0	0		2	29	94- 95				94- 95
				0		5	31	87- 89				87- 89
				0		5	41	80- 83				80- 83
2	1	0	0	0		2	32	90- 92	100-102			92- 94
				0		5	36	83- 85	91- 93			84- 86
				0		5	45	75- 77	84- 87			77- 79
2	0	0	0	1		2	48	81- 84				81- 84
				1		5	51	71- 74				71- 74
				1		5	62	62- 65				62- 65
Below-100000 Markets												
3	0	0	0	0		1	26	97- 98				97- 98
				0		[illegible]	31	89- 91				89- 91
				0		[illegible]	39	82- 85				82- 85
1	1	0	0	1		1	33	78- 81	91- 94			84- 86
				1		[illegible]	37	65- 67	73- 76			68- 71
				1		[illegible]	47	55- 58	64- 68			59- 62
1	0	0	0	2		1	34	59- 63				59- 63
				2		[illegible]	36	46- 48				46- 48
				2		[illegible]	43	37- 39				37- 39

[a] [illegible] equilibrium penetration when the whole market is wired. [illegible] using equation (*) in Park [illegible] p. 37).

[b] The base (100 percent) [illegible] if cable does not exist; [illegible] that all those audiences watched [illegible] in the absence of cable (that is, [illegible] also have overlapping signals from [illegible] markets.

Conclusion

Audience projections are not affected by taking into account differences in diversion among different periods of the day. Revenue projections, which in addition take into account different values of audience during different time periods, are about the same as the audience projections, except possibly for UHF independent stations. For UHF independents, the results depend on which set of estimated revenue weights one uses. Using one set, projected revenues are reduced by cable by more than is projected audience; using the other set, projected revenue is much the same as projected audience for all types of stations.

Sensitivity To Treatment of Total Audience

Most of Fisher's critique (11 out of 19 pages) is devoted to criticism of the total audience equation.[1] He concludes that the equation has so many problems that one might just as well use weighted averages for off-the-air and cable total audience instead of audience predicted by the equation. I reached the same conclusion in my earlier report, but used a different kind of average in my projections. To calculate average audience, I substituted into the total audience equation an values for all variables except the dummy variable that distinguishes off-the-air and cable audience.

Fisher incorrectly claims (pp. 10–11) that using his averages rather than my averages can make a large difference in some markets. His "demonstration" that this is true for a two-UHF and one-UHF network station market is incorrect—*arithmetically in error*.[1]

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[1] Park (1979a, pp. 11–20).

[1] Fisher's example is cable carrying five distant independents into the second-50 market with two VHF and one UHF affiliates (1979a, Table 8, p. 36). The same calculation for one of the VHF network affiliates, following the same format as the example in Park (1979a, pp. 31–33), is:

If there is cable: The fraction of noncable households using television is .280, and the fraction for cable households is .200 (Fisher's weighted averages). Cable penetration is .36. Therefore, total audience in noncable households is .280 x .64T, and total audience in cable households is .299 x .36T. A network VHF station's share of this audience is calculated using the attractiveness indices estimated in (1979a, Table 6). Its share in noncable households is 1/(2 + .45) = .408; its share in cable homes is 1/(2 + .61 + 5 x .32) = .238. Thus its total audience is .408 x .280 x .64T + .238 x .299 x .36T = 0.987T.

If there is no cable and cable does not lead to increased viewing: Of those households that would not subscribe to cable if it were offered, the fraction using television is .280. The corresponding fraction of households that would subscribe if they could is .299; these are more avid viewers, even in the absence of cable. The station attracts a .408 share of both portions of the audience, for a total of .408 x .280 x .64T + .408 x .299 x .36T = .1170T.

If there is no cable and cable does lead to increased TV viewing: Of those households that would not subscribe to cable if it were available, the fraction .280 is using television. The fraction for households that would subscribe is the same. They would watch more if they did subscribe, but without cable they are indistinguishable from the others. The station gets a .408 share of both portions. Its total audience is .408 x .280 x .64T = .408 x .280 x .36T = .1142T.

These three audience calculations are the basis for the audience diversion projection. The network VHF station's audience with cable (0.987T) is 84 percent of its audience without cable if the self-selection hypothesis is true (.1170T), and 86 percent of its audience without cable if the self-selection hypothesis is false (.1142T). Thus the correct range is from 84–86 percent using Fisher's weighted averages,

In fact, it makes almost no difference at all which averages are used. Projections based on Fisher's weighted averages and my revised audience share equation for the full day[2] are shown in Tables 12 and 13. They differ from the projections using my averages (Tables 3 and 4) by at most one percentage point.

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compared with 84–87 percent calculated in (1979a) using my averages and 79–80 in Fisher's erroneous calculation. Similar calculations for the UHF affiliate yield a range of 92–94, compared with 92–95 in (1979a) and 84–86 in Fisher.

[2] This Note, Table 2.

Table 12

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Estimates Using Fisher's Weighted Average Local Audience Figures

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Tel
Top-30 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	102-103	9- 99
				0	0	6	11	96- 97		96- 97	99-100	9- 97
				0	3	6	11	96- 96		95- 96	98- 99	9- 97
3	0	1	1	0	0	2	16	97- 98		97- 98	102-103	9- 98
				0	0	6	16	93- 94		93- 94	97- 98	9- 95
				0	3	6	16	92- 93		92- 93	96- 97	9- 94
3	0	0	2	0	0	2	8	98- 98			101-101	9- 99
				0	0	6	8	96- 97			98- 99	9- 97
				0	3	6	8	95- 96			97- 98	9- 96
3	0	0	0	0	0	3	20	94- 95				9- 95
				0	0	6	20	90- 91				9- 91
				0	3	6	20	89- 90				8- 90
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 97				9- 97
				0	0	5	17	93- 94				9- 94
				0	3	5	17	92- 93				9- 93
2	1	0	0	0	0	2	18	94- 96	[illegible]-101			9- 97
				0	0	5	18	91- 92	[illegible]- 96			9- 93
				0	3	5	18	89- 91	[illegible]- 94			9- 91
2	0	0	0	1	0	2	24	91- 92				9- 92
				1	0	5	24	86- 88				8- 88
				1	3	5	24	85- 86				8- 86
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 98				9- 98
				0	0	4	29	89- 91				8- 91
				0	3	4	29	87- 89				8- 89
1	1	0	0	1	0	1	31	87- 89	[illegible]- 96			8- 91
				1	0	4	31	80- 82	[illegible]- 87			8- 83
				1	3	4	31	78- 80	[illegible]- 84			8- 81
1	0	0	0	2	0	1	41	77- 79				7- 79
				2	0	4	41	70- 72				7- 72
				2	3	4	41	68- 70				6- 70

[a] Average present penetration in markets of each type. Data supplied by FCC Gen Bureau.

[b] Average audience over the full broadcast day. The [illegible] (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 13

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Estimates Using Fisher's Weighted Average Total Audience Figures

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 97		95- 97	105-107	96- 98
				0	0	6	27	90- 92		90- 92	98-100	91- 93
				0	3	6	37	85- 88		85- 87	95- 97	86- 88
3	0	1	1	0	0	2	26	95- 96		94- 96	104-106	95- 97
				0	0	6	30	88- 89		87- 89	95- 97	88- 90
				0	3	6	37	82- 85		82- 84	91- 93	83- 85
3	0	0	2	0	0	2	27	94- 95			102-104	95- 97
				0	0	6	30	87- 88			94- 96	88- 89
				0	3	6	38	81- 83			89- 91	82- 84
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	85- 87				85- 87
				0	3	6	43	78- 80				78- 80
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 95				94- 95
				0	0	5	31	87- 89				87- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 92	99-101			92- 94
				0	0	5	36	82- 84	90- 92			84- 86
				0	3	5	45	75- 77	83- 86			77- 79
2	0	0	0	1	0	2	48	82- 84				82- 84
				1	0	5	51	71- 73				71- 73
				1	3	5	62	62- 65				62- 65
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 98				97- 98
				0	0	4	31	89- 91				89- 91
				0	3	4	39	83- 85				83- 85
1	1	0	0	1	0	1	32	79- 81	91- 94			82- 85
				1	0	4	37	65- 67	73- 76			67- 70
				1	3	4	47	56- 58	64- 67			58- 61
1	0	0	0	1	0	1	74	60- 63				60- 63
				1	0	4	78	43- 47				43- 47
				1	3	4	83	37- 39				37- 39

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Conclusion

Fisher's criticism of my total audience equation is irrelevant to my projections. I use the equation only to calculate a sort of average total audience. The audience diversion projections are insensitive to whether I use my averages or Fisher's averages.

Distinction Between Network Stations and Network Programs

In my earlier study, I distinguished among distant network signals only on the basis of whether they are VHF or UHF stations. As pointed out in (1979a, p. 9), and reemphasized by Fisher (1979, pp. 14–15), this treatment may mask significant differences in the attractiveness of distant stations. I have gone part way toward correcting this problem in this Note by further distinguishing between stations that are sometimes blacked out on the cable to provide nonduplication protection to local network affiliates, and those that are not. One expects, and the results confirm, that the former are less attractive than the latter.

Some important differences may nevertheless remain unaccounted for in the new results. For example, consider a market with two local network stations. If the cable system carries only one distant station affiliated with the missing network, we would expect that station to be just about as attractive as the local stations. In contrast, if it carries three distant stations affiliated with one of the networks already represented in the market, we would expect their attractiveness indices to be much smaller, even if they were never blacked out. Even my new estimates fail to distinguish between the two situations.

Rather than complicate the model to take such differences into account (a strategy that, in my judgment, is unlikely to be productive), I ran the simulations shown in Tables 14 and 15 to see what difference this additional complication might make. For these simulations, I assume that distant primary network stations have attractiveness indices equal to one.[1] The resulting diversion projections differ from those in Tables 3 and 4 only for one- or two-station markets. In such markets, the Table 14 and 15 projections show quite a lot more diversion due to cable operating under present rules (2 to 7 percentage points more in the near term, 5 to 12 percentage points more in the long term) and somewhat more for cable operating under relaxed rules (1 to 4 near term, 3 to 6 long term). For policy purposes, however, one is perhaps most interested in the *incremental* effect of relaxing the rules, and this is projected to be *smaller* in Tables 14 and 15 than in Tables 3 and 4.

[1] Rather than .38, which was estimated by lumping together all distant VHF affiliates not blacked out on the cable. I continue to use .19 as the index for duplicate networks on the cable, assuming that these stations are blacked out part of the time.

Table 14

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Assuming Attractiveness Index of Distant Primary Network Signals = 1.00

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	102-103	98- 99
				0	0	6	11	96- 97		96- 97	99-100	96- 97
				0	3	6	11	96- 96		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		97- 98	102-104	97- 98
				0	0	6	16	93- 95		93- 94	97- 99	93- 95
				0	3	6	16	92- 94		92- 94	96- 97	93- 94
3	0	0	2	0	0	2	8	98- 99			101-102	98- 99
				0	0	6	8	96- 97			98- 99	96- 97
				0	3	6	8	95- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 92				90- 92
				0	3	6	20	89- 91				89- 91
[illegible]-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 96	100-101			95- 97
				0	0	5	18	90- 92	94- 96			91- 93
				0	3	5	18	89- 91	93- 94			90- 91
2	0	0	0	1	0	2	24	88- 90				88- 90
				1	0	5	24	85- 86				85- 86
				1	3	5	24	84- 85				84- 85
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 99				96- 99
				0	0	4	29	89- 92				89- 92
				0	3	4	29	87- 89				87- 89
1	1	0	0	1	0	1	31	82- 85	88- 91			84- 87
				1	0	4	31	78- 80	82- 84			79- 81
				1	3	4	31	76- 79	80- 83			78- 80
1	0	0	0	2	0	1	41	70- 72				70- 72
				2	0	4	41	66- 69				66- 69
				2	3	4	41	65- 68				65- 68

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Table 15

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION
Assuming Attractiveness Index of Distant Primary Network Signals = 1.00

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Station Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		95- 98	105-107	96- 99
				0	0	6	27	90- 92		90- 92	98-100	91- 93
				0	3	6	37	85- 88		85- 88	95- 98	86- 89
3	0	1	1	0	0	2	26	95- 97		94- 96	104-106	95- 97
				0	0	6	30	87- 90		87- 89	95- 98	88- 90
				0	3	6	37	82- 85		82- 85	91- 94	83- 85
3	0	0	2	0	0	2	27	93- 96			103-105	95- 97
				0	0	6	30	86- 89			94- 96	87- 90
				0	3	6	38	80- 83			89- 92	82- 84
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	84- 87				84- 87
				0	3	6	43	78- 81				78- 81
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 96				94- 96
				0	0	5	31	86- 89				86- 89
				0	3	5	41	80- 83				80- 83
2	1	0	0	0	0	2	32	90- 93	99-102			92- 95
				0	0	5	36	82- 85	90- 92			84- 86
				0	3	5	45	75- 78	83- 86			76- 79
2	0	0	0	1	0	2	48	76- 80				76- 80
				1	0	5	51	68- 71				68- 71
				1	3	5	62	59- 62				59- 62
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 99				97- 99
				0	0	4	31	89- 91				89- 91
				0	3	4	39	82- 85				82- 85
1	1	0	0	1	0	1	52	72- 75	81- 85			75- 78
				1	0	4	57	61- 64	68- 72			63- 66
				1	3	4	67	52- 55	60- 63			55- 58
1	0	0	0	2	0	1	74	47- 50				47- 50
				2	0	4	78 -	39- 41				39- 41
				2	3	4	83	31- 34				31- 34

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Conclusion

My results in this Note distinguish between stations that are blacked out to provide nonduplication protection and those that are not. This distinction does not change the audience diversion projections very much from those in my earlier report. If one further assumes that distant primary network stations are just as attractive as local affiliates, the projected diversion due to cable in one- and two-station markets is increased, but the projected incremental diversion due to relaxing present rules is decreased.

Differences In Off-The-Air Reception

Fisher (1979, pp. 15–17) criticizes my assumption concerning off-the-air reception.[2] In (1979a) (and in this Note as well), I assume that a station that attracts any audience at all off the air in a particular county can be received anywhere in that county.[3] Fisher (1979, pp. 15–17) apparently advocates using a different, somewhat more complex, assumption, one which he previously employed in an early cable TV study (1966). He assumed that each station's NWC[1] measures the fraction of households in the county that can receive it.[2]

The histograms plotted in Fig. 1 strongly suggest that neither Fisher's assumption nor mine is perfectly correct. The histograms show the number of stations received in my sample counties, by off-the-air and cable households respectively, that have NWC falling in each 10 percent interval from 0 to 100.[3]

Fisher's assumption equates NWC and receivability. If the assumption were correct, all stations carried on the cable should have NWC equal to 100 percent in cable households, since there is no question but that they are received on the cable. They do not; there are many stations with NWC substantially smaller than 100 percent in cable households.

On the other hand, if my assumption were correct, the cable and off-the-air histograms should have the same appearance. If all stations received by anyone can be received by everyone, then only programming differences remain to account for different NWC. There is no reason to expect that the distribution of programming differs much between

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[2] There is no difference between Fisher and me over cable reception. All subscribers to a particular cable system can receive all of the stations carried by that system. (Fisher mentions blackouts to provide nonduplication protection in the context of cable reception. I agree with him that it is important to distinguish between stations that are blacked out and those that are not, and I do so in this Note.)

[3] In addition, for all of my results except those in Tables 6 and 7, I further assume that 15 local stations with no off-the-air audience in the county can also be received there.

[1] Net weekly circulation, the percent of all TV households that watch the station at least once a week.

[2] Fisher further assumed that any household's ability to receive any one station is independent of its ability to receive any others. The result is that all television households in the county are divided into groups of different sizes, each of which can receive one of the possible combinations of signals. In a simple example, say there are two stations received in the county. Station A's NWC is .7, and station B's is .4. Then Fisher's assumptions imply that 28 percent of the television households can receive both A and B, 42 percent receive A but not B, 12 percent receive B but not A, and 18 percent receive neither. (These percentages are calculated as follows: .7 x .4 = .28; .7 x (1 - .4) = .42; (1 - .7) x .4 = .12; (1 - .7) x (1 - .4) = .18.)

In a formal sense, this second (independence) assumption is perfectly compatible with my treatment of reception patterns: If all TV households can (by my assumption) receive each of the stations, then all of them can receive all of the stations. (The calculation is just 1 x 1 = 1.)

[3] All have positive NWC except for the 15 local stations that are assumed to be receivable even though their off-the-air NWC equals zero.

stations on the cable and stations received off the air, so the NWC distributions should be similar as well. They are not, implying that there are in fact off-the-air reception differences within counties.

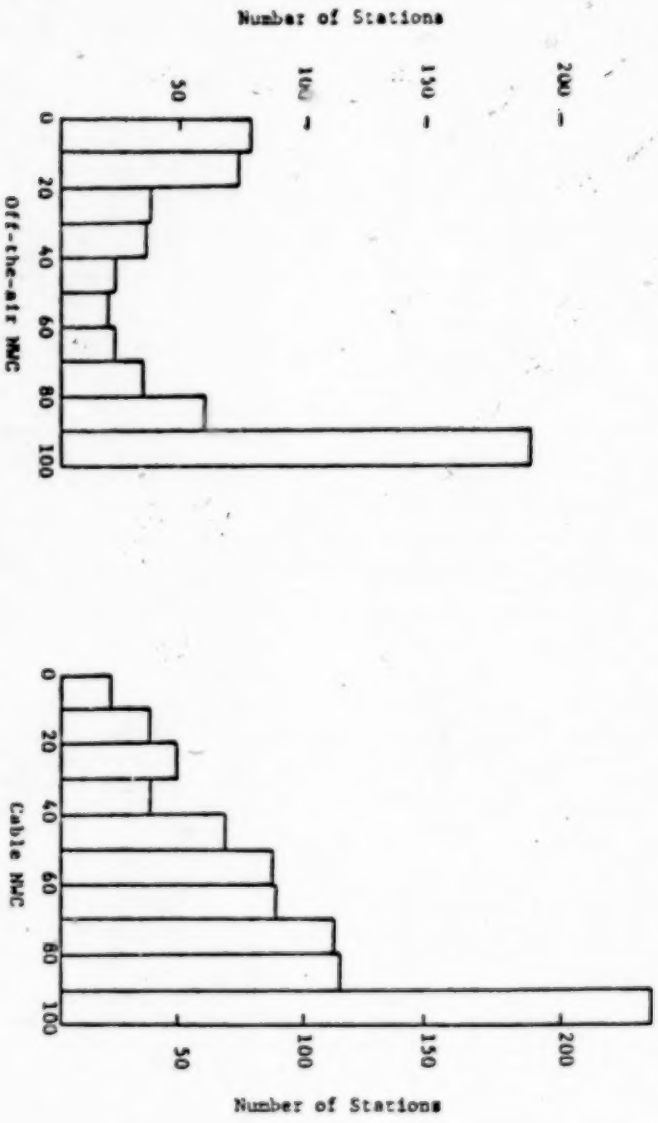

Fig. 1—Frequency count of all stations received in 121 counties by their net weekly circulation off the air and on the cable

Conclusion

I can see no reason to substitute Fisher's more complex (and necessarily unrealistic) assumption about off-the-air reception patterns within counties for my simpler (and necessarily unrealistic) assumption.

Differential Effects of Distant Signals on Independent Stations

It has been asserted that allowing cable systems to carry additional independent stations will take more audience from local independents than it will from local network affiliates. (See, for example, Schink (1979)). This may or may not be true; I know of no statistical evidence that either supports or refutes the assertion.[1]

The simulations in Schink and Thanawala (1978) *appear* to support it by showing a larger proportionate audience loss for independents than for affiliates when the number of imported independents is increased. However, as pointed out by the FCC (1979) and confirmed by Schink (1979), this is simply a result of the assumed specification of the model. The logistic transformation of the dependent variable together with the linear form of the right-hand side of the equation assure that stations with smaller initial audience shares (like independents) will suffer larger proportionate reductions in audience when imported signals increase.

My simulations in (1979a) and in this Note *appear* to refute the assertion by showing the same proportionate audience loss for all local stations when the number of imported independents is increased. However, this result is also hard wired into the model specification.[1]

I suspect that there do not yet exist data sufficient to provide a good statistical test of the assertion. So far, cable systems carrying varying numbers of distant independent stations are scarce in areas with local independent service. Certainly my data are not sufficiently rich to test the assertion, no matter how sophisticated the model fitted to them.

Conclusion

Neither my model nor Schink and Thanawala's sheds any light on the possible differential effect of imported independents on local independents. The question of whether or not independents lose a larger share of their audience than do affiliates is probably unanswerable by statistical methods until we have accumulated more experience with cable systems carrying distant signals into large markets.

Concluding Remarks

Of the six "problems" that are stressed in the industry comments on my earlier study, it appears that four (data problems, time period disaggregation, total audience, and duplicate programs) have almost no effect on my results. There is no simple way to check the effect of the other two (off-the-air reception patterns and differential effect on

---

[1] There is some *case study* evidence against the assertion to be found in the grandfathered market analysis by the FCC (1979). The effect of cable on the audience of the seven independent stations studied there (pp. 84–88) is much the same as its effect on all local stations in the six grandfathered markets that were also studied (pp. 74–84).

[1] In my model, the share of a station of type j is $S_j = a_j/\Sigma a_i n_i$, where a_i is the attractiveness index for stations of type i, n_i is the number of such stations, and the summation is over all receivable stations. The proportionate effect of increasing the number of stations of type k on station j's share is

$$\frac{1}{S_j}\frac{\delta S_j}{\delta n_k} = -a_k/\Sigma a_i n_i,$$

which is the same for all other stations as it is for station j. Schink (1979, pp. 4–7) for some reason mistook my nonlinear model for a linear one and derived a different result.

independents). But neither is there any evidence that would support adoption of the industry-proposed treatment instead of the equally plausible treatment I have used.

Appendix Tables

A.1—A.6

FIRST STAGE AUDIENCE SHARE REGRESSIONS

		Network[a]			Independent[a]			
		L	S	SE	L	S	$\bar{x}$	$\bar{y}$
Full Day								
Off-the-air viewing	VLY	1.00 (b)	.02 (.3)	.13 (2.9)	.30 (2.8)	−.16 (1.0)	.992	.657
	SLY	.46 (8.7)	.12 (.3)	.29 (1.9)	.23 (3.4)	.27 (.6)		
Cable viewing	VLY	1.00 (b)	.34 (7.6)	.20 (3.9)	.31 (3.0)	.44 (4.8)	.458	
	SLY	.39 (10.7)	.13 (1.3)	.18 (.9)	.23 (2.8)	.29 (2.9)		
Daytime								
Off-the-air viewing	VLY	1.00 (b)	.01 (.3)	.11 (2.3)	.44 (2.1)	−.13 (.7)	1.219	.621
	SLY	.28 (5.8)	.00 (.0)	.11 (1.1)	.13 (1.1)	.30 (.3)		
Cable viewing	VLY	1.00 (b)	.29 (5.1)	.14 (3.4)	.48 (2.1)	.41 (3.3)	.621	
	SLY	.43 (8.5)	.07 (.4)	−.05 (.3)	.13 (2.3)	.34 (2.4)		
Early Fringe								
Off-the-air viewing	VLY	1.00 (b)	.01 (.1)	.10 (1.8)	.62 (2.7)	−.11 (.4)	1.343	.707
	SLY	.34 (5.9)	.02 (.1)	.15 (1.0)	.36 (3.4)	.15 (.4)		
Cable viewing	VLY	1.00 (b)	.31 (6.6)	.29 (4.6)	1.13 (3.3)	.87 (4.6)	.652	
	SLY	.40 (3.4)	.05 (.2)	.14 (.4)	.30 (3.3)	.44 (3.3)		
Prime Time								
Off-the-air viewing	VLY	1.00 (b)	.04 (.9)	.15 (3.4)	.49 (3.3)	−.19 (1.3)	.871	.499
	SLY	.33 (11.5)	.29 (1.0)	.17 (.9)	.13 (1.0)	.17 (.4)		
Cable viewing	VLY	1.00 (b)	.43 (9.5)	.18 (4.3)	.79 (2.7)	.31 (4.4)	.480	
	SLY	.43 (14.8)	.29 (1.6)	.23 (1.3)	.09 (1.4)	.16 (1.1)		
Late Fringe								
Off-the-air viewing	VLY	1.00 (b)	−.01 (.1)	.14 (3.7)	.23 (1.3)	−.18 (1.0)	1.151	.366
	SLY	.37 (7.2)	.00 (.0)	.17 (.9)	.19 (3.6)	.26 (.5)		
Cable viewing	VLY	1.00 (b)	.34 (4.7)	.11 (3.9)	.23 (1.0)	.33 (2.4)	.750	
	SLY	.54 (8.4)	.07 (.3)	.06 (.3)	.18 (1.3)	.24 (1.6)		

NOTES: The dependent variable is the station share of total audience during each time period. Estimated coefficients are "instrumentvariable factors" in equation (1). Asymptotic t-statistics are in parentheses. See para. 49[illegible] for a description of the nonlinear constrained least squares estimation method used and a description of S and D.

[a] Indicates local stations. I indicates distant stations not licensed out[illegible] to...ated network stations licensed out to provide non-duplicating programming to...ocal stations.

[b] This coefficient is normalized to one as a reference [illegible] estimation.

Appendix Table A.2

SECOND STAGE UNCONSTRAINED AUDIENCE SHARE EQUATIONS

		Network[a]			Independent[a]	
		L	D	DD	L	D
Full Day						
Off-the-air viewing	VLF	1.00 (b)	.07 (1.8)	.11 (3.0)	.37 (3.2)	-.13 (1.4)
	DLF	.45 (9.7)	.12 (.3)	.23 (1.0)	.18 (4.0)	-.03 (.1)
Cable viewing	VLF	1.00 (b)	.38 (9.1)	.19 (6.7)	.36 (3.4)	.40 (6.0)
	DLF	.45 (12.0)	.15 (1.1)	.15 (1.0)	.28 (3.3)	.25 (3.3)
Daytime						
Off-the-air viewing	VLF	1.00 (b)	.04 (1.2)	.10 (2.4)	.32 (2.4)	-.11 (.7)
	DLF	.31 (8.4)	-.02 (.1)	.28 (1.1)	.28 (3.4)	-.18 (.3)
Cable viewing	VLF	1.00 (b)	.30 (3.9)	.14 (3.9)	.33 (3.4)	.38 (4.0)
	DLF	.47 (2.1)	.06 (.4)	-.04 (.2)	.29 (2.6)	.27 (3.3)
Early Fringe						
Off-the-air viewing	VLF	1.00 (b)	.07 (1.4)	.19 (2.1)	.92 (3.1)	-.18 (1.3)
	DLF	.44 (7.3)	-.03 (.3)	.36 (1.1)	.43 (4.1)	-.09 (.3)
Cable viewing	VLF	1.00 (b)	.23 (3.8)	.21 (3.9)	1.17 (3.3)	.76 (3.9)
	DLF	.33 (7.0)	.07 (.1)	.18 (.7)	.61 (3.9)	.34 (3.9)
Prime Time						
Off-the-air viewing	VLF	1.00 (b)	.06 (1.6)	.13 (3.3)	.31 (3.4)	-.33 (3.1)
	DLF	.37 (a)	.24 (1.0)	.24 (1.0)	.17 (3.0)	.13 (.3)
Cable viewing	VLF	1.00 (b)	.42 (10.2)	.17 (6.7)	.41 (3.1)	.29 (6.9)
	DLF	.33 (13.1)	.27 (1.9)	.21 (1.3)	.11 (1.8)	.14 (2.1)
Late Fringe						
Off-the-air viewing	VLF	1.00 (b)	.21 (.4)	.12 (2.7)	.23 (1.3)	-.37 (2.1)
	DLF	.41 (7.6)	.46 (1.2)	.17 (.6)	.22 (3.0)	-.12 (.4)
Cable viewing	VLF	1.00 (b)	.13 (3.1)	.19 (6.3)	.23 (1.1)	.29 (2.0)
	DLF	.37 (7.0)	.09 (.3)	.01 (.0)	.13 (1.9)	.19 (1.3)

NOTES: The dependent variable is the station share of total audience during each time period. Estimated coefficients are "attractiveness indices" in equation (1). Asymptotic t-statistics are in parentheses. See Park (1979a) for a description of the maximum generalized least squares estimation method used.

[a] L indicates local stations. D indicates distant stations not viewed via DD indicates distant network stations viewed via to provide nondiscrimination protection to local stations

[b] This coefficient is normalized to one as a reference value for comparison

Appendix Table A-3

[illegible]

		[illegible]			[illegible]			
		1	2	3	1	2	R^2	F
Full Day								
Off-the-air stations	α_1	1.00	.06	.07	.17	.06		
		(b)	(2.1)	(2.3)	(3.4)	(a)		
	α_2	.47	.16	.11	.13	.00		
		(10.2)	(.7)	(1.0)	(0.0)	(a)		
Cable stations	α_1	1.00	.26	.12	.26	.44	.48	1.37
		(b)	(5.1)	(2)	(2.4)	(5.7)	(4.0)	(12.0)
	α_2	.45	.16	.09	.20	.27		
		(a)	(1.3)	(a)	(a)	(3.1)		
Daytime								
Off-the-air stations	α_1	1.00	.06	.09	.15	.00		
		(b)	(1.1)	(2.1)	(3.5)	(a)		
	α_2	.15	.00	.15	.15	.00		
		(3.0)	(a)	(1.7)	(3.3)	(a)		
Cable stations	α_1	1.00	.26	.13	.24	.41	.42	1.41
		(b)	(3.9)	(a)	(2.5)	(4.3)	(3.9)	(9.0)
	α_2	.46	.08	.06	.23	.27		
		(a)	(.9)	(a)	(a)	(2.9)		
Early Fringe								
Off-the-air stations	α_1	1.00	.06	.06	.15	.00		
		(b)	(1.7)	(1.7)	(3.1)	(a)		
	α_2	.44	.00	.26	.17	.00		
		(7.3)	(a)	(3.1)	(4.4)	(a)		
Cable stations	α_1	1.00	.24	.20	1.17	.00	.06	1.22
		(b)	(3.9)	(a)	(3.5)	(0.1)	(3.7)	(9.0)
	α_2	.21	.00	.00	.27	.27		
		(a)	(.4)	(a)	(a)	(4.1)		
Prime Time								
Off-the-air stations	α_1	1.00	.06	.09	.23	.00		
		(b)	(1.0)	(1.4)	(3.6)	(a)		
	α_2	.06	.06	.22	.12	.00		
		(12.4)	(1.2)	(.9)	(2.6)	(a)		
Cable stations	α_1	1.00	.43	.15	.44	.20	.37	1.44
		(b)	(10.2)	(a)	(5.1)	(3.2)	(6.9)	(13.2)
	α_2	.00	.20	.11	.13	.13		
		(a)	(3.1)	(a)	(a)	(3.2)		
Late Fringe								
Off-the-air stations	α_1	1.00	.00	.09	.23	.00		
		(b)	(.0)	(2.2)	(3.2)	(a)		
	α_2	.44	.01	.22	.08	.00		
		(6.1)	(1.1)	(.9)	(1.9)	(a)		
Cable stations	α_1	1.00	.26	.18	.23	.26	.36	1.37
		(b)	(3.2)	(a)	(1.1)	(2.1)	(3.9)	(9.2)
	α_2	.37	.00	.04	.27	.21		
		(a)	(.3)	(a)	(a)	(1.7)		

NOTES: The dependent variable is the station share of total audience during each time period. Estimated coefficients are "correctiveness indices" in equation (1). Appropriate transformations are as parentheses. See Park (1976a) for a description of the nonlinear generalized least squares estimation method used.

[a] Indicates most stations. I indicates station stations not located on 30 contiguous stations network stations stations not to provide nonsimultaneous generation to local stations.

[b] This coefficient is constrained to one as a reference parameter estimate.

[c] This coefficient is constrained to equal 0 since the corresponding off-the-air coefficient. 0 is an estimated restriction.

[d] This coefficient is constrained to equal OLS since the corresponding cable coefficient for distant network stations that are not located on OLS is an unbiased estimation.

[e] The non-negativity constraint is binding for this coefficient.

Appendix Table A.4

SECOND STAGE CONSTRAINTED AUDIENCE SHARE EQUATION
ESTIMATED WITH SAMPLE THAT EXCLUDES LOCAL STATIONS
WITH OFF-THE-AIR NWC EQUAL TO ZERO

		Network[a]			Independent[a]			
		L	D	DB	L	D	BLK	K
		Full Day						
Off-the-air viewing								
	VHF	1.00	.10	.11	.61	-.26		
		(b)	(2.6)	(2.8)	(3.9)	(2.5)		
	UHF	.52	(.08)	.18	.27	-.04		
		(10.4)	(.4)	(.9)	(3.8)	(.2)		
Cable viewing								
	VHF	1.00	.39	.18	.59	.36	.47	1.30
		(b)	(9.3)	(d)	(3.5)	(5.3)	(4.8)	(12.6)
	UHF	.67	.12	.06	.35	.27		
		(c)	(1.0)	(d)	(c)	(3.5)		

NOTES: The dependent variable is the station share of total audience during the full-day time period. Estimated coefficients are "attractiveness indices" in equation (1). Asymptotic t-statistics are in parentheses. See Park (1979c) for a description of the nonlinear generalized least squares estimation method used.

[a] L indicates local stations. D indicates distant stations not blacked out. DB indicates distant network stations blacked out to provide nonduplication protection to local stations.

[b] This coefficient is normalized to one as a reference value—not estimated.

[c] This coefficient is constrained to equal K times the correspondong off-the-air coefficient. K is an estimated multiplier.

[d] This coefficient is constrained to equal BLK times the corresponding cable coefficient for distant network stations that are not blacked out. BLK is an estimated multiplier.

Appendix Table A.3

NEAR-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION: Composite Estimates Based on Equations for Four Time Periods (Daytime, Early Fringe, Prime Time, Late Fringe)

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Stations Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	11	98- 99		98- 99	101-102	98- 99
				0	0	6	11	96- 97		96- 97	98- 99	96- 97
				0	3	6	11	96- 97		95- 96	98- 99	96- 97
3	0	1	1	0	0	2	16	97- 98		96- 98	101-102	97- 98
				0	0	6	16	94- 95		93- 94	96- 98	94- 95
				0	3	6	16	93- 94		92- 93	95- 96	93- 94
3	0	0	2	0	0	2	8	98- 99			100-101	98- 99
				0	0	6	8	96- 97			98- 98	96- 97
				0	3	6	8	96- 96			97- 98	96- 96
3	0	0	0	0	0	3	20	94- 95				94- 95
				0	0	6	20	90- 92				90- 92
				0	3	6	20	89- 91				89- 91
Second-50 Markets												
3	0	0	0	0	0	2	17	96- 98				96- 98
				0	0	5	17	93- 94				93- 94
				0	3	5	17	92- 93				92- 93
2	1	0	0	0	0	2	18	94- 96	100-102			95- 97
				0	0	5	18	91- 92	95- 97			91- 93
				0	3	5	18	89- 91	94- 95			90- 92
2	0	0	0	1	0	2	24	91- 93				91- 93
				1	0	5	24	86- 88				86- 88
				1	3	5	24	85- 87				85- 87
Below-100 Markets												
3	0	0	0	0	0	1	29	96- 99				96- 99
				0	0	4	29	90- 92				90- 92
				0	3	4	29	87- 90				87- 90
1	1	0	0	1	0	1	31	87- 89	95- 97			89- 92
				1	0	4	31	80- 82	86- 88			82- 84
				1	3	4	31	78- 80	83- 86			80- 82
1	0	0	0	2	0	1	41	77- 80				77- 80
				2	0	4	41	70- 73				70- 73
				2	3	4	41	68- 71				68- 71

[a] Average present penetration in markets of each type. Data supplied by FCC Cable Bureau.

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Appendix Table A.6

LONG-TERM EFFECT OF CABLE ON LOCAL STATION AUDIENCE IN REPRESENTATIVE MARKETS UNDER PRESENT AND POTENTIAL RELAXED CABLE REGULATION: Composite Estimates Based on Equations for Four Time Periods (Daytime, Early Fringe, Prime Time, Late Fringe)

Network		Independent		Distant Stations			Cable Penetration[a]	Index of Local Stations Audience[b] If Cable Exists				
				Prim.	Dupl.			Network		Independent		
VHF	UHF	VHF	UHF	Net.	Net.	Ind.		VHF	UHF	VHF	UHF	Total
Top-50 Markets												
3	0	3	2	0	0	2	25	96- 98		95- 97	103-105	96- 99
				0	0	6	27	91- 93		90- 92	96- 99	91- 93
				0	3	6	37	86- 89		85- 87	93- 96	86- 89
3	0	1	1	0	0	2	26	95- 97		94- 96	102-104	95- 97
				0	0	6	30	88- 90		87- 89	93- 95	88- 90
				0	3	6	37	83- 86		82- 84	89- 92	83- 86
3	0	0	2	0	0	2	27	94- 96			101-103	95- 97
				0	0	6	30	87- 89			92- 94	88- 90
				0	3	6	38	81- 84			87- 90	82- 85
3	0	0	0	0	0	3	30	91- 93				91- 93
				0	0	6	32	85- 87				85- 87
				0	3	6	43	78- 81				78- 81
Second-50 Markets												
3	0	0	0	0	0	2	29	94- 96				94- 96
				0	0	5	31	87- 89				87- 89
				0	3	5	41	81- 83				81- 83
2	1	0	0	0	0	2	32	90- 93	100-103			92- 94
				0	0	5	36	82- 85	91- 94			84- 87
				0	3	5	45	75- 78	85- 88			77- 80
2	0	0	0	1	0	2	48	82- 85				82- 85
				1	0	5	51	71- 74				71- 74
				1	3	5	62	63- 66				63- 66
Below-100 Markets												
3	0	0	0	0	0	1	26	97- 99				97- 99
				0	0	4	31	89- 91				89- 91
				0	3	4	39	83- 86				83- 86
1	1	0	0	1	0	1	52	78- 82	92- 95			83- 86
				1	0	4	57	64- 68	75- 78			68- 71
				1	3	4	67	56- 59	66- 70			59- 62
1	0	0	0	2	0	1	74	60- 64				60- 64
				2	0	4	76	46- 49				46- 49
				2	3	4	83	37- 40				37- 40

[a] Eventual equilibrium penetration when the whole market is wired, calculated using equation (*) in Park (1971, p. 27).

[b] Average audience over the full broadcast day. The base (100 percent) is the audience if cable does not exist; it assumes that all the audience watches local stations in the absence of cable (that is, there are no overlapping signals from adjacent markets).

Appendix B

Data Description

All of the data used in this study are reproduced in Park (1979b). Unless otherwise stated, the data are from the ARB (American Research Bureau) Arbitron Television 1977 County Coverage, CATV-Controlled Counties. The items included are as follows:

County

County number is arbitrarily assigned. County name and state are also shown.

Market

The number shown for the market is its rank according to ARB area of dominant influence (ADI)[1] television households (TVH). The ranking is for 1977–1978.[2] A list that translates market ranks to market names precedes the data tables. A "1" or "2" following the decimal point is arbitrarily assigned to distinguish between markets that tied in the ARB rankings.

Time Zone

The code for the time zone in which the county is located is:

1 Eastern

2 Central

3 Mountain

4 Pacific

Income

Median family income in 1969 for the county is from *County and City Data Book, 1972, A Statistical Abstract Supplement*, U.S. Department of Commerce.

COTVH

COTVH is the number of television households (in hundreds) in the county as estimated by ARB for 1977–1978.[3] Numbers are shown separately for non-cable households (O for off the air) and for cable households (C). Cable penetration in the county (COPEN) is calculated from COTVH as C/(O+C).

SYSTVH

The number of households (in hundreds) passed by the cable television system's installed trunk and feeder cable are from FCC records. The numbers come from reports that cable systems are required to make to the FCC annually on Form 325. C indicates the number of subscribing households; O is the number of households passed by the cable that do not subscribe. The latter number is calculated by subtracting reported subscribers from reported homes passed. In some cases, due to definitional or reporting problems, the result is a negative number. If so, nonsubscribing households passed is set equal to zero. System penetration (SYSPEN) is calculated using SYSTVH as C/(O+C).

INTAB

INTAB households (the units here are single households, not hundreds) are those

[1] A market's ADI includes (with a few exceptions) all those counties within which a market's stations attract more viewers than any other market.

[2] Television Markets and Rankings Guide, 1977–78, Arbitron Television, New York.

[3] As of January 1, 1978.

included in ARB's survey sample, reported separately for off-the-air and cable households.

LCLSHR

Local share is the share of full-day (or total) audience captured by local stations, shown separately for off-the-air and cable viewers. Counties with an off-the-air local share less than 70 are excluded from the analysis in this report.

HUT

Homes using television is (roughly) the fraction of television households that are watching television at any given time. It is reported separately for five different time periods or "day parts," some of which are defined differently in different time zones, as follows:

	Eastern and Pacific	Central and Mountain
Total (or Full Day)	6:00 am-2:00 am Monday-Sunday	6:00 am-2:00 am Monday-Sunday
Daytime	6:00 am-4:30 pm Monday-Friday	6:00 am-3:30 pm Monday-Friday
Early Fringe	4:30 pm-7:30 pm Monday-Friday	3:30 pm-6:30 pm Monday-Friday
Prime Time	7:30 pm-11:00 pm Monday-Sunday	6:30 pm-10:00 pm Monday-Sunday
Late Fringe	11:00 pm-2:00 am Monday-Friday	10:00 pm-2:00 am Monday-Friday

The fraction of homes using television is calculated from ARB reports of total hours watched as in the following example. ARB estimates that non-cable households in our County 1 watched a total of 718,800 hours per week during the TOTAL or FULL-DAY period. There are 18,100 such households; if they all had watched TV all the time, they would have watched a total of 2,534,000 hours (18,000 households times 20 possible hours per day times 7 days per week). Thus on average over the FULL-DAY period, .284 is the fraction watching TV at any given time.

Station

Call sign and channel assignment (from the Television Markets and Rankings Guide, 1977–78) are shown for each station reported to be watched in the county. In a few cases, data for parent and satellite stations are combined. Then the first letter of the call sign is replaced by an asterisk. In such cases SHAREs are combined by adding parent and satellite SHAREs, and NWCs (net weekly circulation) are combined by taking the maximum of parent and sate-lite NWC.

AFFIL

Affiliation codes are as follows:

1 ABC

2 CBS

3 NBC

4 Independent commercial

5 Noncommercial.

The first number in the three-digit sequence is primary affiliation; the second, if nonzero, is secondary affiliation; and the third is tertiary affiliation, all of which comes from the Television Markets and Rankings Guide, 1977–78.

P

Nonduplication protection codes for network affiliates are as follows:

0 Station is blacked out to provide nonduplication protection to some other station.

1 Station is neither blacked out nor protected.

2 Station receives nonduplication protection against one or more other stations.

Nonduplication protection status was determined by the FCC staff based on an application of Subpart F of the *Cable Television Regulations*, telephone interview with cable system operators, and a review of ARB nonduplication editing procedures. The procedure was as follows:

1. Set P = theoretical protection status per Subpart F.
2. If P is compatible with observed audience shares, stop.
3. Set P = actual protection status in 1977 as determined by talking to the system operator on the telephone.
4. If P is compatible with observed audience shares, stop.
5. Check ARB records to see if ARB was in 1977 editing their audience data as though the station had some protection status not equal to P. If so, set P = editing protection status.

MKT

MKT is the rank of the ADI market to which the station is assigned, according to the list that precedes the data tables. With a few exceptions, if the station's market is the same as the county's market, the station is counted as a local station; otherwise, it is classified as a distant station. The exceptions are:

- All stations with nonduplication protection code equal to 2 are counted as local stations, regardless of what market the county is in.
- All stations with nonduplication protection code equal to 0 are counted as distant stations, regardless of what market the county is in.

Share

Station share is the number of households watching a particular station, expressed as a percentage of households watching any station. SHARE is reported separately for each of five time periods, and separately for off-the-air and cable viewers. Shares may not add to 100 because of rounding or because some stations that are watched are not included in the ARB report (notably foreign stations and stations that individually receive very low viewing in the ARB sample).

NWC

Net weekly circulation is the percentage of households (off the air and cable separately) that watch the station at least once a week.

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APPENDIX C

A Case Study Analysis of Non-Commercial Television Stations in Grandfathered Markets

1. A separate analysis for non-commercial television stations was performed in the *Report in Docket 21284* because the financial results for these stations were not as readily available to the Commission, as they were for commercial stations and their sources of revenues are different from those of commercial stations. Ideally, we would like to (1) assess the economic viability of non-commercial stations by monitoring their revenues and profits over a number of years and (2) determine the impact of cable television on their economic viability. Unfortunately, we were frustrated partially in attempting to achieve either of these objectives, in part, because non-commercial stations do not routinely report their financial results to the Commission. Furthermore, not one non-commercial television station has offered us any financial data in this proceeding concerning its economic viability. Finally, we also suffer from a lack of a sound theoretical and/or empirical basis from which to determine or assess factors influencing the amount of money or the value of goods that viewers contribute to non-commercial television stations. This is true because a reduction in the number of viewing hours of non-commercial stations does not imply necessarily a reduction in viewer contributions or revenues for these stations, as it does for commercial stations. Faced with these limitations, we restricted our study of non-commercial stations to an analysis of station audience, including that of net weekly circulation audience. Overall audience trends for non-commercial stations over the past five years were monitored. Additionally, the impact of cable television on the audiences of these stations was estimated. While we were aware that viewer contributions are only one of several sources of revenue for non-commercial stations, we felt that for cable television to threaten the economic viability of these stations, it must *at least* divert a significant amount of audience from these stations.[1]

2. Before proceeding, we note that we were able to uncover only three scholarly studies of the effect of cable television on non-commercial stations. The Carnegie Commission on the Future of Public Broadcasting reports that "by enhancing reception of television signals, and through the importation of out-of-town signals, CATV can assist in extending public broadcasting service to the public."[2] The second study by Avery, Long, and Traudt concludes that "cable subscribers are as likely, if not more so, as non-cable viewers to make voluntary contributions to their local public television stations."[3] [4] It should be noted that not one comment in this proceeding has produced

[1] In fact, only about 15 percent of the support for public stations comes directly from television viewers as individuals.

[2] The Carnegie Commission on the Future of Public Broadcasting, *A Public Trust*, 366–367 (1979).

[3] R. K. Avery, J. F. Long, and P. J. Traudt of the Department of Communications, University of Utah, "The Effect of CATV on Awareness and Local Financial Support of a Public Television Station," March 1978, prepared for the Corporation for Public Broadcasting.

[4] We note that one party in this proceeding, Joint Comments of Nine Non-commercial

any definitive findings of the effect of cable television on non-commercial television stations. Although Donald E. Agostino, in a study funded by the Corporation of Public Broadcasting, found that cable television caused "only very slight fractionalization of the audience," he concludes that the impact of cable television merits further investigation.[5]

3. Our study examined seventeen non-commercial television stations in fourteen markets. Three of these markets were studied in the "Grandfathered Market Analysis" of commercial stations in the *Report in Docket 21284*. The other eleven markets, containing fourteen non-commercial stations, were chosen because they also are characterized by high cable penetration, at least 30 percent in 1972, and a large number of imported signals. Our conclusion from studying these cases was that whatever adverse effect cable may have had on these stations' audiences, it generally has not been large enough to offset other factors contributing to their audience growth. Of particular significance, we found that cable television often provides audience gains to both VHF and UHF non-commercial stations within their local service area because of improvement in signal reception. It is important to note that these gains are realized by stations facing substantial competition from cable television because of extraordinarily high marketwide cable penetration and the large number of distant signals imported by the cable systems.

4. The Commission's analysis of the effect of distant signals on non-commercial television stations has been found to be unacceptable by several parties. For example, the National Association of Educational Broadcasters (NAEB) claims that there is not "the slightest indication that the Commission has more than minimally examined the effect of the deletion of its distant signal carriage and syndicated exclusivity restrictions upon public broadcasters."[6] Additionally, the Joint Motion contends that "the effect of the FCC's proposed action with respect to distant signals on non-commercial (ETV) stations is virtually ignored."[7] We disagree with these assessments. In addition to searching the literature for scholarly research and carefully examining the comments in this and in other proceedings before the Commission,[8] we prepared a detailed report on the effect of distant signals on non-commercial stations which included 85 pages of economic data and analysis.[9] We believe that terms such as "virtually ignored" or "minimally examined" certainly cannot be used to describe accurately our procedure for analyzing the effect of distant signals on non-commercial stations.

5. We have directed our analysis specifically to assess the possible effect of changes in our existing rules.[10] For example, the sample for our study of non-commercial stations

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Television Broadcast Stations, criticize the results of the study by Avery, Long and Traudt. This party claims that cable subscribers, having greater disposable income, tend to be the very viewers on whom public television depends most heavily for relatively large voluntary contributions. Having no data on this point, we will not attempt to estimate the validity of the criticism, nor the potential effect of this criticism, if it is valid, on the outcome of the study.

[5] *See* Donald E. Agostino, "The Cable Subscribers Viewing of Public Television: A Comparison of Public Television Use Between Broadcast Viewers and Cable Subscribers Within Selected Markets," February 1978. *See also* Agostino, Comments on Studies of the Impact of Cable Television on Audience Shares, Docket 21284, February 8, 1978.

[6] The National Association of Educational Broadcasters, Comments, Docket 21284, September 17, 1979.

[7] Association of Independent Television Stations, Inc., *et al.*, Joint Motion for Revision of Procedures, Docket 21284, June 22, 1979 at 26.

[8] We have processed numerous petitions for special relief from the cable carriage of distant non-commercial stations. *See, e.g., Cablevision Systems* 70 FCC 2d 1931 (1979).

[9] *See* Appendix C, *Report in Docket 21284*.

[10] Our rules specify that cable systems may carry any non-commercial station, in the

was chosen to include local non-commercial stations operating in markets with high cable penetration and a large number of distant commercial signals.[11] However, this is not to say, as the Joint Comments allege, that "the study fails to examine the audience impact of importation of distant non-commercial stations on the local public broadcast service."[12] Five stations in our sample also faced additional competition from the importation of distant non-commercial signals. Any negative effect of cable on these stations' audiences was found to be minimal. Therefore, while several parties found the results for these stations to be inconclusive, we disagree with these assessments. For example, the NAEB finds "the data gathered in the remaining six [sic] markets [into which distant non-commercial stations were imported] yield no positive conclusions concerning the effect of distant signal importation. Two of the markets studied showed apparent gains in "rating" and "share," two markets showed a loss in "rating" and "share," while data were unavailable in the other two markets."[13] However, the facts in our *Report* demonstrate that all five stations which face additional competition from distant non-commercial stations received gains in their NWC audience from cable television.[14] [15] Furthermore, to produce meaningful conclusions, the study is not required to show only audience gains or losses to non-commercial stations from cable television, but to identify the effect, ik any, of cable television on these stations' ability to serve the public. The overall increases in audiences that these stations generally receive, irrespective of the impact of cable television, suggests strongly that their ability to serve the public is not threatened by cable television. For instance, the largest audience loss attributable to cable for *any* station in our sample of non-commercial stations (whether or not they compete against distant non-commercial stations) is between 11 and 15 percent (depending on whether share or rating data are employed). Yet, this station has realized a 20 percent overall gain in its average 9AM-Midnight audience over the past five years and a 110 percent increase in NWC audience over the same period. Therefore, we find that there is no indication that the service provided by local non-commercial stations is affected adversely by cable television, even in cases where distant non-commercial stations are imported.

6. NAEB also finds that "the study of non-commercial licensees measures only audience impact and not economic viability, which the Commission acknowledges is the fundamental concern of a licensee."[16] Additionally, the Joint Comments claim that "increased cable penetration is likely to decrease the absolute amounts of voluntary contributions from viewers . . . which will likely be in greater than linear relationships to increases in cable subscribership."[17] Viewer contributions are only one of several sources of revenue for non-commercial stations. In this respect public television stations

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absence of objection filed pursuant to Section 76.7 (i.e. provision for special relief) by any local non-commercial educational station or state or local educational television authority.

[11] We do not isolate specifically the effect of our syndicated exclusivity rules in the analysis of non-commercial stations because the vast majority of stations in our sample do not operate in markets receiving this protection to any significant degree. Moreover, non-commercial stations themselves exercise no rights under these rules.

[12] Joint Comments, *supra*, at n. 9, at 4.

[13] *Supra* at n. 5, at 9.

[14] For a discussion of why net weekly circulation is a more appropriate measure of the impact of cable television on non-commercial stations than "ratings" or "share," *see, e.g.*, the Comments of the Public Broadcasting Service in this proceeding, dated March 15, 1978.

[15] We have been assuming, in the special relief context, that the percentage NWC of the local non-commercial station would be reduced by 50 percent in cable households by the importation of one distant non-commercial station. *See, e.g., Norman Cable*, 67 FCC 2d 1084 (1978). The evidence uncovered in this proceeding demonstrates clearly that this assumption was invalid.

[16] *Supra* at n. 5 at 9.

[17] *Supra* at n. 9 at 4.

are somewhat protected from whatever impacts might result from changes in contribution patterns resulting from the growth of cable television operations. For example, membership contributions and auctions accounted for only 15% of the revenues derived by public television licensees in 1976.[18] We are aware that governmental contributions under the Public Broadcasting Financing Act of 1975 and in some other situations are tied to viewer contributions. We find, however, no reason or evidence to suggest that viewer contributions to local non-commercial stations will decrease because of the importation of distant signals. Thus our analysis of audience suggests that the economic viability of non-commercial stations is not threatened by cable television. In any case, governmental funding formulas are not irrevocable and are subject to change over time. We see no reasons why governmental funding of public television would decrease because the programming from these stations is made more widely available through cable television carriage. In fact, the federal contribution to public television has increased markedly over the past decade.

7. The Joint Comments also contend that "since the value of the study depends on its data being typical, the failure to specify how the markets were selected is a serious problem that calls into question the validity of any generalization based solely on these markets."[19] We must emphasize that not only is our sample not chosen to be typical, but its value is enhanced exceedingly by the fact that it is atypical. The markets selected represent cases where there are extraordinarily high levels of cable penetration and a large number of distant signals. The sample includes the three markets of the "Grandfathered Market Analysis" which contain non-commercial stations, and all other markets with at least 30 percent cable penetration in 1972 that contain a local non-commercial station. If distant signals are to affect adversely the service provided by local non-commercial stations, it is in these markets where the effect will be seen. If there is no adverse effect in these markets, it is extremely unlikely that there will be an adverse effect from distant signals in other markets. The markets selected provide an excellent indication of the effect of cable in an unregulated market.

8. There also are several specific criticisms raised in the comments concerning our analysis of non-commercial stations. For example, the Joint Motion specifies three instances of typographical errors and also questions the use of audience figures of less than one percent. It contends that "errors of this type indicate a lack of precision that may prejudice the significance of all data reported in this Appendix, as well as the conclusions reached by the staff."[20] This contention is unfounded. For example, the computation of audience ratings below 1 percent for individual counties (rather than rounding to zero) increases the precision of the results by making use of all available viewing data for non-commercial stations. The Joint Motion interprets mistakenly our calculations for station ratings in individual counties (which turn out to be less than one percent) to be " 'symbol[s]' used by the rating services to indicate an audience level 'below minimum standards' ".[21] However, these figures are not "symbols" provided by the rating services but rather are actual viewing statistics for individual stations that are derived from our multiplication of county rating (i.e., the average percentage of homes using television in a county) by each individual station's share of total viewing in that county. Hence, our calculations increase the precision of the reported audience estimates. Additionally, while there are some typographical errors in the study, there is no confusion possible concerning the correct identification of the stations to which the errors apply. The correct classification of all three stations in question is highlighted both in the keynote summary table (Table I, Appendix C) and at the start of the analysis

[18] The Public Broadcasting Service, Comments, Docket 21284, March 15, 1978, Appendix A, Table 4.
[19] *Supra* at n. 9 at 7.
[20] *Supra* at n. 6, at 29.
[21] *Id.* at 29.

for each specific case (Item 1.A). Hence, these typographical errors are of no consequence to the conclusions reached in the *Report*.

9. The Joint Comments claims "that [a] close look [at the Yakima market] shows the study to be totally unreliable."[22] The major criticism here is that the impact from cable is analyzed and averaged over the entire ADI, rather than analyzed only for those counties which are close to the principal city of the licensee. Additionally, the parties note that the study includes no data for Yakima couunty, which is part of the ADI. Before addressing these comments, it should be noted that Arbitron Television does not provide viewing data for cable and non-cable households in counties where less than 10 percent of the television households subscribe to cable television. Where data are not available for a county, we extrapolate the average viewer behavior of cable subscribers in the entire market for whom data are available to the cable subscribers that are not otherwise represented in the impact measurements. In the Yakima market, extrapolation is required for only 5 percent of the total number of cable subscribers. We estimate the effect of cable on local station audiences over the entire ADI because this is the area in which the local television stations receive a preponderance of viewing. The study is designed to provide a reliable and accurate indication of the impact of cable television on local non-commercial station audiences in an essentially unregulated market. Thus, we view the criticisms raised by the Joint Comments to be without validity.

10. The Joint Comments also question which systems were considered "major" and what proportion of the cable homes within a market had to receive the distant signals over cable before those signals were counted as available on cable in that market. The answer is that we selected all cable systems that served principal cities in the television markets. In this way, we are certain that at least a majority of the cable subscribers in a market have access to the signals that are listed as available on cable in that market.

11. Finally, the Joint Comments claim that other factors such as increases in UHF receiver penetration and increases in radiated power and antenna height cannot act to offset the adverse impact of cable indefinitely. The belief is that "with lower if not truly zero population growth, particularly in certain areas of the county, secular growth in the number of homes served by particular public stations will stop if not actually decline at some point."[23] It should be noted, however, that only three of the seventeen stations analyzed operate at maximum radiated power. Other factors which can also serve to increase both station audience and viewer contributions include marketing techniques such as revised program schedules. Finally, the Census Bureau predicts that population will continue to increase throughout this decade. Thus, we believe that factors leading to the overall audience growth of non-commercial stations generally will continue to offset any losses attributable to cable television into the foreseeable future.

12. In conclusion, we find that the criticisms of our analysis do not disprove our conclusion that the effect of distant signals on local non-commercial audience is minimal. Cable television usually increases the net weekly circulation of local non-commercial stations even in markets with extraordinarily high cable penetration and a large number of distant signals. In cases where there is some diversion of audience due to cable, these losses usually are more than offset by other factors which act to increase station audiences and audience size is not the sole determinant of revenues for non-commercial stations.

13. Existing rules do not limit the number of distant noncommercial educational television stations that a cable system may carry except when there is objection to such carriage by local educational stations. In those instances where there is an objection, the

[22] *Supra* at n. 9 at 5.
[23] *Id.* at 10.

Commission attempts to determine, on the basis of the facts presented, whether the viewing public in the area would in fact be injured by the signal carriage proposed.[24] This relatively unrestricted carriage was authorized because, in the Commission's view, in the absence of objection, "the widest possible dissemination of educational and public television programming is clearly of public benefit and should not be restricted."[25]

14. Although there are many differences between the commercial and public stations relating to possible impacts resulting from cable distant signal carriage, we do not believe these weigh in favor of more restrictive regulation with respect to carriage of public stations. Rather, we believe that the policy of encouraging the widest possible dissemination of public television station programming should be further encouraged by a liberalization of our rules which act to restrict carriage of non-commercial stations in markets where objections are filed.

15. Because these stations are so heavily dependent on tax revenues, it seems to us that we should be especially cautious in denying citizens as much access to their output as possible. Although perhaps ultimately justifiable if necessary for the preservation of the public television system itself, it is anomalous for government, and particularly the federal government, to contribute toward the creation of a system of public television as an alternative source of diverse programming to that supplied by the commercial stations while at the same time restricting the public's access to additional sources of the programming created by the system. In recent years the public resources made available to public broadcasting have been greatly expanded[26] and while strong arguments can be made that even greater funding is necessary,[27] it seems to us that the free flow of information from this system is fundamentally desirable and that it is unlikely that cable television operations will sharply impact on public contributions to local stations, and highly unlikely that overall revenues will be significantly affected.

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[24] For a discussion of the application of the existing rules see *Public Cable Co.* 64 FCC 2d 701 (1977), *aff'd sub nom. Colby-Bates-Bowdoin Educational Telecasting Corp. v. FCC*, 574 F. 2d 639 (1st Cir. 1978).

[25] *Cable Television Report and Order*, *supra*, at paragraph 95.

[26] The federal contribution, for example, increased 293% from 1970 to 1977.

[27] See *A Public Trust, the Report of the Carnegie Commission on the Future of Public Broadcasting* (1979).

APPENDIX E

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

§76.5 [amended].

1. In Section 76.5, paragraphs (p), (q), (r), (s), (t), (ii), (jj), and (kk) are deleted.

§76.6 [amended].

2. In Section 76.7, paragraph (h) is amended to read as follows:

§76.7 Special Relief.

* * * * * * *

(h) On a finding that the public interest so requires, the Commission may determine that a system community unit operating or proposing to operate in a community located outside the 48 contiguous states shall comply with the provisions of Subparts D, F, and G of this part in addition to the provisions thereof otherwise applicable.

§76.57 [amended].

3. In Section 76.57, paragraphs (c) and (d) are deleted.

§76.59 [amended].

4. In Section 76.59, paragraphs (d) and (e) are deleted, and paragraphs (b) and (c) are amended to read as follows:

§76.59 Provisions for smaller television markets.

* * * * * * *

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this Section, any such community unit may carry any additional television signals.

(c) Where the community is located wholly or partially within one of the major television markets listed in Section 76.51(a) and also wholly or partially within a smaller television market, the carriage provisions for the major markets shall apply.

§76.61 [amended].

5. In Section 76.61, paragraphs (c), (d), (e), and (f) are deleted, and the caption, introductory language, and paragraph (b) are amended to read as follows:

§76.61 Provisions for the major television markets.

Where a system serves a community that is located in whole or in part within a major television market, that community unit shall carry television broadcast signals only in accordance with the following provisions:

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this Section, any such community unit may carry any additional television signals.

§76.63 [deleted].

6. Section 76.63 is deleted.

§76.65 [amended].

7. In Section 76.65, paragraphs (a) and (b) are deleted, the caption is amended, and paragraph (c) is redesignated paragraph (a) and is amended to read as follows:

§76.65 Determination of signal contours.

(a) When, for purposes of ascertaining broadcast station rights to cable carriage, reference is made to Grade B contours §§76.57(a), 76.59(a), and 76.61(a), such contours shall be the field intensity contours defined in §73.683(a) of this chapter: *Provided, however,* That such rights as to signals carried or authorized for carriage on or before August 26, 1977, shall be determined by reference to the contour prediction rules adopted in the *Sixth Report and Order in Dockets 8736, 8975, 8976 and 9175,* 41 FCC 148 (1952) as amended by *Report and Order in Docket 17253,* FCC 70-345, 22 FCC 2d 354 (1970).

§76.151 [deleted].

8. Section 76.151 is deleted.

§76.153 [deleted].

9. Section 76.153 is deleted.

§76.155 [deleted].

10. Section 76.155 is deleted.

§76.157 [deleted].

11. Section 76.157 is deleted.

§76.159 [deleted].

12. Section 76.159 is deleted.

§76.161 [deleted].

13. Section 76.161 is deleted.

§76.305 [amended].

14. In Section 76.305, paragraph (a)(5) is deleted.

Separate Statement of Charles D. Ferris, Chairman

Re: Elimination of Cable Distant Signal and Syndicated Exclusivity Rules

By today's action, the FCC has removed the regulatory debris of a previous decade; we have thus expanded the choices that consumers will have in the future.

Both restrictions we have struck down today were conceived during a time when regulatory policy was guided by hunch as often as by facts. Unfortunately, our rules have too often served the interests of one industry at the expense of another in the well-intended but mistaken belief that they would therefore serve the communications consumers. In fact, the syndicated exclusivity rules were openly the result of a Commission-ratified compromise struck by various commercial interests without benefit of public scrutiny or comment.

Yet, as we have now confirmed, these rules, when subjected to

thorough analysis, lack the slightest hint of justification in terms of the overall interest of television viewers. Cable has not and will not destroy broadcasting, as was once feared. Broadcasting profits have continued to grow at a fast pace, despite cable's rapid expansion. In fact, our staff has found that cable has in many cases improved the profitability of broadcast stations by improving the reception of an otherwise weak UHF signal.

It is also clear that removing the "protection" of exclusivity arrangements will not "destroy" the supply of program materials. This regulatory protection is in fact rarely requested by local broadcasters and would, in any event, provide a small scope of security to a relatively limited number of programs even if they were applied.

The program supply market can now develop undistorted by this artificial regulatory scheme. It will adjust to a new reality where advertising rates will reflect both the distant as well as the local viewer and the value of syndicated rights will account for viewers who can watch programs at times that are more convenient to them.

Today's action results from two changes in the FCC's regulatory approach. First, we are now committed to submitting outdated rules and innovative proposals to rigorous analysis, and to do so with the benefit of expanded public input. We have replaced regulatory intuition with regulatory analysis.

Second, we have rediscovered that the best protection of consumers is gained, not by protecting particular industries, but by increasing consumer choice. Today's action allows cable systems to provide the signals and programs for which their subscribers are willing to pay. By broadening the range of options available to television viewers, we insure that the future development of video services is responsive to their needs and not the dictates of a regulatory body.

We have also rejected a proposal forwarded by the National Telecommunications and Information Administration to substitute for our syndicated exclusivity rules a system of retransmission consent. This proposal has some theoretical appeal, although its practical application would be burdensome and could well prove to frustrate consumer choice more than even our current rules.

Whatever its appeal, however, we are without jurisdiction to implement this proposal. It is clear from the legislative history of the 1976 Copyright Revision Act that Congress considered and rejected such a plan and decided instead to adopt a system of compulsory licensing for cable. In the face of that choice, we cannot adopt a conflicting scheme.

Congress itself provides the proper forum for parties to seek to change the compensation arrangements set forth in the 1976 Act and subsequent actions of the Copyright Royalty Tribunal.

APPENDIX B

STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * /Market	Net I	local** sign.	1973e catv pen.	1978e catv pen.	1977 $-mkt. aud. (000s)	1978 $-mkt. aud. (000's)	$ chg	1973 revs (000's)	1978 revs (000's)	$ chg	1973 op. income (000's)	1978 op. income (000's)	$ chg
WBZ (N,V) Boston, MA	6	2H,31,4E	7	10	179	185	3			49			41
WSVB (A,V) Boston, MA	6	2H,31,4E	7	10	145	175	21			91			268
WHDH (C,V) Boston, MA	6	2H,31,4E	7	10	158	146	(8)			41			35
WCOB (I,U) Boston, MA	6	2H,31,4E	7	10		9							
WEHM (I, U) Boston, Ma	6	2H,31,4E	7	10	50	56	12			186			297
WLVI (I,U) Boston, MA	6	2H,31,4E	7	10	39	52	33			158			(-)to(+)
WSBK IN MKT. Boston, MA	6	2H,31,4E	7	10	581	623	7	58,167	104,048	79	19,492	39,531	103
KTCH (N,A,V) Helena, MT	210	1N	41	42	1	2	100			199			50
KWIK (A,V) Cedar Rapid, IA	70	4H, 2E	7	9	22	32	45			120			85
WREX (A,V) Rockford, IL	100	2H	14	37	23	22	(4)			68			123
KSNF (A,V) Joplin, MO	113	2H	20	26	18	21	17			55			109
WEHT(C,U) Evansville, IN	87	2H, 2E	7	17	21	20	(5)			139			(-)to(+)
KHQ (N,V) Spokane, WA	75	2H, 3E	20	23	31	36	16			121			724
WBTV (C,V) Charlotte, NC	34	2H,2I,4E	8	8	81	82	1			89			70
WRRT (N,V) Richmond, VA	56	4H, 3E	11	9	32	32	0			80			100
KTVE (A,V) Eldorado, AR	106	2H, 1E	16	21	12	14	17			77			33

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THIS NOTICE IN DOCKETS 20988 AND 21284

Station * Market	Grade of Service	Local** Signs.	1973B catv pen.	1978B catv pen.	1973 B-ald. aud. (000s)	1978 B-ald. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. Income (000's)	1978 op. Income (000's)	% chg
WALB (N,A,V) Albany, GA	150	1N	20	30	29	31	7			80			116
WJHG (A,V)Panama City, FL	178	2N	25	26	9	14	56			33			(9)
KLTV (A,N,V) Tyler, TX	158	1N	42	47	14	19	36			88			139
WPDE(C,A,V) Florence SC	156	1N, 1E	23	28	26	28	8			94			123
KSYD(N/A,V)Alexandria, MN	152	1N, 1E	28	25	25	29	16			110			343
WWNY (C,A,V) Watertown, NY	164	1N, 2E	38	40	16	15	(6)			43			44
WJAC(N,V) Laurel, MS Hattiesburg, MS	167	1N	21	21	17	18	6			108			170
KALB(N,A,V), Alex., LA	171	1N	28	37	21	19	(10)			61			37
KAIT(A,V) Jonesboro, AR	172	1N, 2E	22	29	11	17	55			139			215
KVHL (N,V) Lake Charles, LA	173	1N	12	30	11	17	55			117			160
KTWO (C,A,N,V) Cheyenne, WY	176	1N	35	47	14	13	(7)			101			89
WJMC (C/A,N,V) Marquette, MI	178	1N, 1E	48	52	16	17	6			85			157
KECY (C,V) El Centro, CA	184	2N	76	61	2	2	0			50			(-)to(-)
WLOX (A,V) Biloxi-Gulf Port, MS	183	1N, 1E	35	65	10	18	80			148			207

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * Market	Mkt #	Local** sigs.	1973h catv pen.	1978h catv pen.	1973 $-mkt avl. (000s)	1978 $-mkt. avl. (000s)	$ chg	1973 revs (000's)	1978 revs (000's)	$ chg	1973 op. income (000's)	1978 op. income (000's)	$ chg
KTVI(A,V)St. Joseph, MO	181	IN	28	46	14	12	(14)		105				204
[illegible]	195	IN	57	39	7	6	(14)		93				133
[illegible]	186	IN	46	35	13	11	(15)		116				275
WAPI (A,V) Greenwood Greenville, MS	192	IN, IR	35	40	11	15	36		74				(3)
WBBJ (A,V) Jackson, TN	190	IN, IR	29	33	10	15	50		111				75
[illegible]	188	IN	36	41	5	7	40		48				124
WSET(A,V)Harrisburg, VA	199	IN	21	31	10	11	10		65				394
[illegible]	197	IN	38	48	8	4	(50)		(75)				(77)
WBKO (A,V) [illegible]	198	IN, IR		7	6	12	50		81				140
WTVM(A,V)Columbus, GA	202	IN	19	26	14	14	0		84				191
[illegible]	201	IN, IR	98	17	8	7	17		64				414
WAAY(A,V) Decatur, AL	208	IN		38	3/	4			1829				(-)to(+)
WTSA (N,V) [illegible]	205	IN	46	48	1	3	200		92				(-)to(+)

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STATIONS AND MARKETS WHOSE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20508 AND 21284

Station(s) * Market	Mkt #	Local** sigs.	1973h catv pen.	1978h catv pen.	1973 9-mkt. aud. (000s)	1978 9-mkt. aud. (000s)	% chg	1973 revs ($000's)	1978 revs ($000's)	% chg	1973 op. income ($000's)	1978 op. income ($000's)	% chg
WBRC (N,A) Birmingham, AL	207	IN	73	55	4	4	0		57				(111)
WBTV (N,C) Charlotte, NC	309	IN, IE	21	26	4	5	25		105				184
WJBO (A,V) Baton Rouge, LA	211	IN, IE		53	1/	3							
WTOC (N,C) Savannah, GA	212	IN	55	59	NA	NA	NA		76				11
WIBW (C,A,V) Topeka, KS	111	IN, IE	23	28	20	25	(11)		78				124
KTKA (N,U) Topeka, KS	111	IN, IE	23	28	8	10	25		154				(-)to(+)
WSB (C,A,V) Atlanta, GA	147	IN, IE	33	40	29	28	(3)		98				150
WAGA (N, U) Atlanta, GA	147	IN, IE	33	40	4	8	100		111				4829
WKTV (N,A) Utica, NY	151	IN	49	48	19	18	(5)		57				30
WUTR (N,U) Utica, NY	151	IN	49	48	5	8	60		136				(-)to(-)
WTVJ (C,V) Tallahassee, FL	140	IN, IE	27	30	28	31	11		66				60
WCTV (N, U) Tallahassee, FL	140	IN, IE	27	30	1/	6							
WJHG (C,A) Panama City, FL	157	IN	21	20	24	22	(8)		114				171

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * Market	sat ?	local** sigs.	1973h catv pen.	1978h catv pen.	1973 $-mill. aud. ('000s)	1978 $-mill. aud. ('000s)	% chg	1973 revs ('000's)	1978 revs ('000's)	% chg	1973 op. income ('000's)	1978 op. income ('000's)	% chg
WBRC (A,U) Birmingham, AL	157	2N	21	20	3	3	0			72			18
WTOC (C/A, V) Meridian, MS	169	2N, 2E	21	26	18	20	11			76			135
WTTV (N,A,V) Meridian, MS	169	2N, 2E	21	26	3/	2	NA			2206			(-)to(+)
WFTV (A,V) Orlando, FL	40	3N, 1E	21	26	37	62	68			164			541
WMAR (C/A/N, U) Baltimore, MD	168	1N, 1E	46	58	12	14	17			78			74
WDAF (C,V) Cincinnati, OH	12	3N, 1E	9	25	79	77	(3)			91			139
WTHR (A,V) Indianapolis, IN	20	3N,2I,3E	11	16	61	71	16			90			195
KGO (I,U) San Fran., CA	5	3N,8I,3E	20	30	35	45	29			247			(-)to(+)
WGN (I,U) Chicago, IL	3	3N,5I,2E	2	3	55	120	118			110			(-)to(+)
WXON (I,U) Detroit, MI	7	3N,3I,1E,1C	1	2	66	90	36			114			271
WPHL (I,U) Philadelphia PA	4	4N,9I,4E	15	17	62	61	(2)			167			2250
WTBS (I,U) Pascagoula, AL	109	1N	31	40	3	5	67			127			228
KTVK (N,I) Tempe, AZ	104	2N	76	61	3	5	67			162			(+)to(-)

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Market	Rank	Local stns.	1978 catv pen.	1978A catv pen.	1973 3-mkt aud. (000s)	1978 3-mkt. aud. (000s)	% chg	1973 revs (000's)	1978 revs (000's)	% chg	1973 op. income (000's)	1978 op. income (000's)	% chg
[illegible]	91	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			[illegible]			[illegible]
WTVM (A,V) Columbus, GA	121	3N, 3E	18	30	28	30	7			61			79
WTVW (A,V) Evansville, IN	87	3N, 2E	9	17	28	31	11			89			153
[illegible]	179	3N	19	21	4	8	[illegible]			[illegible]			[illegible]
[illegible]	161	2N	14	15	17	18	6			128			203
[illegible], WV	178	2N	42	55	12	11	(8)			136			235
Cheyenne, Wyoming	176	1N, (2S)	35	47	14	13	(7)			101			89
[illegible]	164	1N, (2S)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			[illegible]			[illegible]
[illegible], Montana	175	2N	30	35	16	17	6			69			155
[illegible], Montana	210	1N	41	42	1	2	100			199			50
[illegible], Idaho	161	3N, 1E	27	28	20	26	30	1,506	3,294	119	291	478	64
[illegible]	---	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]			[illegible]			[illegible]
[illegible]	153	2N, (1S)	20	19	23	25	9			109			191
[illegible]	166	2N,1E,(4S)	31	33	18	24	33			116			180
Twin Falls, Idaho	195	1N	57	39	7	6	(14)			93			133

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station & Market	Mkt #	Local** Stns.	1973E catv pen.	1978E catv pen.	1973 $-mkt avl. (000s)	1978 $-mkt. avl. (000s)	% chg	1973 revs ($000's)	1978 revs ($000's)	% chg	1973 op. income ($000's)	1978 op. income ($000's)	% chg
KVDA (A,V) San Antonio, TX	136	2N	30	21	13	16	23		330			242	
KCPQ (A,V) Seattle, WA	18	3N,1I,3E	20	23	93	103	11		123			184	
KSTU (A,V) Portland, OR	22	4N,1I,3E	12	14	51	72	41		138			297	
WBKZ (A,U) Battle Creek, MI	79	4N, 1E	8	21	10	40	300		291			(-)to(+)	
WTTV (I,V) Bloomington IN	20	3N,2I,3E	11	16	50	45	(10)		106			95	
KTVB (N,V) Boise, ID	141	3N, 1E	6	7	16	17	6		118			132	
WHIZ (N,A,V, U) Zanesville, OH	203	1N	54	53	5	7	40		54			80	
WTSP (I,U) Tampa St. Pete, FL	17	4N,1I,2E	10	16	24	44	83		344			699	
WEIL (A,V) Hartford, IL	76	3N,2E,(1S)	10	18	12	19	58		92			114	
WGEM (Satellite) Quincy Bluff, MO	76	3N,2E,(1S)	10	18	Included in WEIL								

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * Market	mkt #	Local** sigs.	1973h catv pen.	1978h catv pen.	1973 $-aid. aud. (000s)	1978 $-aid. aud. (000s)	$ chg	1973 revs ($000's)	1978 revs ($000's)	$ chg	1973 op. income ($000's)	1978 op. income ($000's)	$ chg
KTVH (Terminated operations in 1975, facility converted to noncommercial station) Le Grand, CA													
WOR (I,V) New York, NY	1	3M,6I,6E	5	10	105	237	126		45			69	
WOR-M (I,V) New York, NY	1	3M,6I,6E	5	10	273	412	51		69			102	
WOR-T (I,V) New York, NY	1	3M,6I,6E	5	10	168	289	72		173			1342	
XETV (I,V) San Diego, CA	28	3M,1I,1E	27	37	18	21	17	g/					
KZAZ (I,V) Tucson, AZ	91	3M,1I,1E	10	12	4	5	25		90			(+)to(-)	
KFRE (I,V) San Fran. CA	5	3M,8I,3E,	20	30	66	94	424		136			182	
KGSN (I,U) Fresno-Tulare, CA	69	3M, 1I	8	8	7	15	114		337			2538	
WKJG (I,U) Ft. Wayne, IN	96	3M, 1I	3	11	1/	14							
WNDU (I,U) South Bend, IN	79	3M,1I,1E,	4	17	1/	3							

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STATIONS AND MARKETS WHERE POTENTIAL HARM IS ALLEGED IN COMMENTS RESPONSIVE TO THE NOTICE IN DOCKETS 20988 AND 21284

Station * Market	net #	local** sigs.	1973h catv pen.	1978h catv pen.	1973 5-yrld mkt. ($000s)	1978 5-yrld. mkt. ($000s)	% chg	1973 revs ($000's)	1978 revs ($000's)	% chg	1973 op. income ($000's)	1978 op. income ($000's)	% chg
&/The(1,V)Seattle-Tacoma,WA	18	3N,1I,3E,	20	23	22	44	100			383			(-)to(+)
SAN FRANCISCO, CA	5	3N,0I,3E	20	30	511	613	20	62,337	123,230	98	19,072	48,875	141
&&.be(N,U)LAS VEGAS, NV	126	3N, 1E	30	36	4	6				204			217
&&&&(N,V)CHARLOTTE AMALIE, VI										38			120

1/ STATION NOT IN OPERATION IN 1973

2/ SATELLITE STATION INCLUDED

3/ STATION WAS SATELLITE IN 1973; AUDIENCE NOT LISTED

4/ STATION LICENSED IN MEXICO; FINANCIAL DATA NOT AVAILABLE

*CODE
N=NBC
A=ABC
C=CBS
I=INDEP.
V=UHF
U=UHF

**CODE
N=NETWORK STATION
I=INDEPENDENT
E=EDUCATIONAL
C=CANADIAN
S=SATELLITE

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DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

IN RE: CABLE TELEVISION SIGNAL CARRIAGE

Free Lunch

I dissent to authorizing unlimited distant signals for CATV systems without including a syndicated exclusivity provision in the rules or at least a time for adjustment before a change in the exclusivity rules would become effective.

The majority has rationalized this decision by calling it pro-competitive. I disagree. How can this situation be competition? The broadcaster and the program supplier negotiate in the marketplace and establish a market price for the product which includes exclusivity. The CATV system takes the programming without participating in the marketplace and without any regard for the contractual rights of those who have participated. It uses this programming for its own profit.

I recognize that copyright legislation is supposed to be the solution for this problem. With syndicated exclusivity protection in our rules, it may be. As one who lived through the "Consensus Agreement," the development of our 1972 rules, and the Copyright Act, I can assure my colleagues that maintaining syndicated exclusivity was the understanding of all of the participants. It was one of the premises of the copyright legislation.

The majority say that payment for the product one uses to make a profit is not our concern, but it is. A long line of cases starting with *Southwestern Cable* clearly hold that authorizing signal carriage and establishing the ground rules for that carriage from the public interest viewpoint is the essence of the Commission's responsibility regarding CATV.[1] One aspect of our public interest concern, according to several of my colleagues, is fair play in the marketplace.[2] "Diversity" as an end in itself does not justify the Commission's disregard for a fairly functioning marketplace, particularly when that diversity is simply a matter of timing; no programming will be excluded.

I do recognize that times change and that the participants in the marketplace must adjust to change. I simply do not think that, on a warm day in July, the Commission should instantaneously change all of the ground rules governing the functioning of this marketplace and leave the participants without any time to adjust. Instead, I would have preferred to see the Commission authorize distant signals and phase out the syndicated exclusivity protection. The wiser and fairer

[1] The *HBO* and *NARUC II* cases referenced by the majority deal with Commission restraints on the nonbroadcast services of CATV and, thus, have no bearing on this situation. The courts objected to FCC restrictions on CATV activities which really were competitive.

[2] Carriage of signals without any accommodation of the exclusivity rights of the broadcasters and program suppliers reminds me of the current problem pay programmers are having with the theft of their signals. My colleagues have been outraged by that situation. I don't see how this is different.

decision in this proceeding would have been to provide a date certain in the future for the end of syndicated exclusivity protection. With knowledge of what our rules will be and of the period of time for adjustment, the parties could then renegotiate their contracts, settle the copyright issue, and establish a new marketplace environment that includes all of the participants. By allowing this period of adjustment, the Commission could extricate itself from its concerns about distant signal carriage without leaving chaos in the wake of its decision.

Because the Commission has chosen to upset the marketplace without providing for any reasonable period of adjustment, I dissent.

DISSENTING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

IN RE: REPORT AND ORDER IN DOCKET 20988 (SYNDICATED EXCLUSIVITY) AND DOCKET 21284 (DISTANT SIGNAL CARRIAGE).

Over the past years in office I have more than supported cable deregulations—I have advocated it. I actively supported: the removal of the leapfrogging rules and the feature film restrictions, the waiver for the ARTEC cable system in Arlington, the deregulation of earth stations, the exemptions for smaller systems, stabilization of franchise fees and a host of other measures that I believed—and continue to believe—advanced the development of cable.

However, I strongly believe that elimination of syndicated exclusivity is inequitable, not needed, not wanted by a significant number of cable TV owners and operators, and is counter to long-term public interest.

I have dissented to the Report and Order in its entirety in order to honor specific requests from the Chairman of the Committee which deals with copyright, the upcoming Chairman of the Commerce Committee, and a number of other interested Congressmen and Senators, all of whom have urged that this Commission, before undertaking any significant revision of the distant signal restrictions or syndicated exclusivity rules, should first coordinate such steps with appropriate committees in the Congress.

Congressional leaders most involved with communications and copyright specifically requested that the FCC defer action until after the Copyright Royalty Tribunal review in September 1980. Among those writing were Congressman Robert W. Kastenmeier, Chairman of the subcommittee with copyright responsibility and oversight, and Congressman John Dingell, upcoming Chairman of the House Interstate and Foreign Commerce Committee. Four key members of the Judiciary Committee, Congressmen Moorhead, Railsback, Swift and Sawyer in a jointly signed letter stated:

> "We know that Congressman Kastenmeier, Chairman of the Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, stated in his March 13 letter to you on this subject, a willingness for his subcommittee to review the need for legislation in this area in the next Congress. He also stressed the

> importance of allowing the Tribunal the opportunity to complete its first full years of duties without changing the environment within which the affected industries must function. We would like to join in urging that the Commission postpone any significant revision of the syndicated exclusivity and distant signal rules until Congress has had the opportunity to revisit this issue with the benefit of the results of the Tribunal's first recommendations."

Other Congressional leaders who wrote letters urging deferring action were Senators Birch Bayh and Don Riegle and Congressmen Danielson and Mazzoli. I agree with their expressed concern that precipitate action could upset the delicate balance of the copyright and communications policies under the 1976 Copyright Act. The action of the majority in adopting the Report and Order flaunts the requests of these concerned congressional interests.

Aside from congressional warnings, I would have urged the retention of the syndicated exclusivity rule but would have been willing to eliminate those rules limiting distant signal importation by cable systems. As to the matter of retransmission consent, I would prefer to reserve judgment as to the legality of such requirement as well as the advisability in light of the 1976 Copyright Act.

However, I am uncomfortable with the concept of expropriating a valuable property—a television program—with neither consent from nor compensation to the owner of that property. Although the Copyright Act of 1976 purported to deal with this problem, it is widely conceded that it has utterly failed to do so in any meaningful way. My second concern is the total disregard by the majority of the contract rights of both syndicators and broadcasters and the consequences of that disregard. Where the majority tends to view the importation of syndicated programs as some kind of free lunch for viewers, experience has taught me that there is no free lunch. Producers of programs must have incentives and the virtual total loss of control of their productions after the initial sale to a broadcaster goes a long way toward eliminating the necessary incentives and creating a condition of program anarchy.

Companies in both cable and broadcasting with a larger future stake in cable rather than broadcasting urge the retention of syndicated exclusivity (Storer, Cox, GE, etc.)

The Commission's Economic Report relied upon by the majority has received widespread criticism on methodology and objectivity. Statements in the Storer filing in response to the Notice of Proposed Rulemaking are particularly significant.

> "The Report's chief defect is that the outside economists retained to prepare them had previously and publicly prejudged the questions they were retained to study. In consequence their conclusions were merely expectable and can be described, at best, as seriously flawed and negligently so. This assessment is harsh but plainly correct: the Reports pick and choose among the record materials, favoring those which support the "desired" conclusions while discounting, distorting, or even ignoring those which do not. An NCTA submission on impact was accepted uncritically while a NAB submission (the Wharton Study) was not. Two Cooper studies on behalf of

INTV were not even discussed in the Report; nor was the study by Professor Fisher of MIT or ABC's smaller market study.

"Even the Broadcast Bureau's telling critique of the economic analyses was largely ignored. Significantly, the Bureau had pointed out that they lacked analytical depth, failed to use current data, and should have employed a 'more balanced appraisal.'

"Not content with elevating selective analysis to an art form, the economists also ignored completely the question of impact during fringe time—the period of cable's greatest impact and independent television's greatest vulnerability. Moreover, they dealt with 'average audience losses' in a way which recalls the six-footer drowning in a lake with an 'average' depth of only three feet. The *Park* study had projected audience losses of 41% and 30% in single-station and two-station markets below the top 100, respectively, but the Economic Inquiry Report concludes that 'in all but the most extreme cases the additional audience loss will be less than 10 percent in the foreseeable future.' (Par. 117). The 'averaging' process, of course, shrouds the true and devastating impact on at least 50 single-station markets subject to Park's predicted 41% audience diversion.

"In short, the economic 'analyses' are objective only in the same sense that PLO might objectively analyze the Egyptian-Israeli peace treaty. And this would be apparent to a reviewing court which, although not permitted to substitute its policy judgment for that of the agency, can and does require that the agency base its rulings on a coherent record."

If a study or any evidence indicated that the syndicated exclusivity rule imposed a significant burden hampering the growth and development of cable television, I would carefully weigh that factor. To the contrary, the current pace of cable growth is exploding! Broadcasters are in an almost desperate rush to get into the business.

Also, if it could be shown that the public stood to gain more than it will lose through abandonment of the rule, my choice would be clear; the public must be served. Arguments extolling the virtues of "time diversity" notwithstanding, we are abandoning an incentive for true diversity of programming—the production and distribution of programming not now available. We are simply providing more conduits for recirculation of the same material over and over again. I believe we can do better in promoting the public interest than assuring the presentation of ".bonanza" at all hours of the day and night.

During the Commission's deliberation of this issue, I considered a possible moratorium on abandonment of the rule. This course seemed attractive at first glance because it would protect existing syndication contracts for a period of time. However, I could not reconcile my fundamental concern about the inequity of unbridled use of a product by some entity which neither produced it nor purchased its use.

The Congress has recognized that the existing Copyright Law is flawed. As mentioned before, leading members of Congress who are most responsible for eliminating these flaws have asked the Commission to postpone action on both syndicated exclusivity protection and unlimited signal carriage until the Congress and the Copyright Tribunal have more opportunity to deal with the problems. I fail to

understand why—despite those reasonable entreaties—the majority felt constrained to move with such unseemly haste.

Finally, I note that the television industry today is generally prospering quite admirably, and cable television continues to expand by leaps and bounds. Cable with all types of program and pay products available is now viable for major markets. It is a very desirable additional service to those consumers who can afford to pay a monthly fee. It is not a boon to the poor in the ghettos who must rely on a TV service free of additional financial requirements. I believe there is a vital public interest in both preserving a free TV service to the consumer and yet encouraging a diversified pay service to those who can afford a monthly fee. The viewing public today has the present advantage of program diversity in various forms with more options assured for the future. It seems to me that this Commission in its efforts to readjust public interest benefits must not take out of one and put into the other until the scales are completely unbalanced. In my opinion, the long-term public interest considerations in retaining syndicated exclusivity requirements are more persuasive than those elusive benefits proclaimed by the majority in the Report and Order.

I dissent to adoption of the Report and Order.

DISSENTING STATEMENT OF COMMISSIONER ABBOTT WASHBURN

RE: DISTANT SIGNAL AND SYNDICATED PROGRAM EXCLUSIVITY RULES

Instead of acting in today's premature fashion to eliminate, posthaste, the distant signal and syndicated exclusivity rules, a more judicious approach on the part of the Commission would have been to conduct an oral argument before making final determination. The record of these proceedings is voluminous and the report itself, with accompanying appendices, exceeds 500 pages. Still, even after reviewing the record, questions persist which it would have been useful to have heard addressed by the parties before the Commission. An oral argument with give-and-take from the bench would also have given us helpful new insights into the issues.

Now, in my view, is *not* the time for the Commission to be changing the ground rules under which the 1976 Copyright Act was drafted. Congressman Kastenmeier, Chairman of the Judiciary Subcommittee, has written us, saying:

> The 1976 Copyright Act was written against the backdrop of existing communications law and regulations . . . . It is impossible to completely separate copyright law and communications policy as the Copyright Act of 1976 is now written. Therefore, I would urge the Commission to delay taking any action which would disturb the delicate balance of copyright and communications policy until the Copyright Royalty Tribunal has been given an opportunity to carry out its 1980 review and Congress is in a position to respond, if necessary.

It's all very well to say, as the item does, that this is not our business—that we're not responsible, Congress is. But meanwhile there are basic

inequities here, inequities which some cable industry spokesmen themselves recognize. Cable is going through the revolving door on the other fellow's push. We at the FCC, in my judgment, cannot just blind our eyes to these inequities—for they have a bearing on how the communications facilities are used "in the public interest," and that's our business under the 1934 Act.

In May, at the National Cable Television Association convention, Congressman Van Deerlin, Chairman of the Subcommittee on Communications, stated that the Copyright Tribunal is not working, and predicted that "sooner rather than later, Congress will have to revise copyright policy for the cable television industry."

So Congress is doing some re-thinking. The Royalty Tribunal has not had adequate opportunity to function, and to complete its first five-year review required by the Copyright Act. Chairman Kastenmeier, Senator Riegel, Congressman Dingle and other Members of the House and Senate have urgently requested us not to act precipitously. Is this a good time, therefore, to change the ground rules? No, it is a *bad* time; and I can see no real reason for our racing to such action. As Chairman Kastenmeier in his March 13 letter to Chairman Ferris on the proposal to deregulate cable said: "We did not contemplate such a sweeping change in the regulatory structure when we drafted Public Law 94–533."

Contrary to the language of the Opinion and Order, the studies upon which today's action relies are *not* conclusive. For example, the item goes to great lengths to minimize the probable impact on TV stations of the elimination of syndicated exclusivity. But there is little evidence to support this contention in situations where cable penetration is 40 to 50% of TV households in a community. This cannot but have a serious diluting effect on the viewership of the local station. Many eyeballs will shift to the other signals. How many? No one knows. Yet the cable industry is predicting future market penetrations on this order of magnitude.

Finally, I am very concerned by the action of the majority in deleting the exclusivity rules without providing a transition period for those who entered into contracts in good faith reliance on our rules. These parties will now be prejudiced through no fault of their own, a result which is unjust and unfair. Instead, I would have preferred to have provided for a reasonable period of time in which existing contracts, entered into in reliance on our rules, would have remained in effect. To this end, I offered an unsuccessful motion to include language in the Order that would have provided a grace period of up to three years for the orderly phasing out of existing contracts. This would also have given the Congress needed time in which to make necessary adjustments to the Copyright Act.

In summary, I must dissent to this unnecessary and ill-timed deletion of the rules, an action which unfairly and immediately voids legal contracts made in good faith on the basis of our rules.

SEPARATE STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

IN RE: REPORT AND ORDER IN DOCKETS 20988 AND 21284 - CABLE TELEVISION SYNDICATED EXCLUSIVITY AND SIGNAL CARRIAGE RULES

At the commencement of this rule making proceeding,[1] I stated that the Commission's existing cable television rules and policies "assumed harm to the public interest before it materialized and placed a heavy burden of proof on new technology and additional services to show that they would not injure the status quo," and that "this regulatory approach and policy has been misguided from the standpoint of economic reality, consumer welfare, and the larger public interest." I further stated that "something more than mere conjecture or intuitive assumptions should be required before we impose regulatory constraints and burdens on one industry or technology in favor of another," and that "In an era of explosive technological innovation, the public interest is better served by regulatory deference to the marketplace and competitive forces until experience, rather than speculation, demonstrates the existence of problems or inadequacies."

The extensive record amassed in this proceeding only serves to confirm these fundamental observations. The deletion of these unnecessary and counterproductive rules is firmly premised in the public interest and this action has my complete approval and support.

SEPARATE STATEMENT OF COMMISSIONER TYRONE BROWN

RE: REPORT AND ORDER IN THE MATTER OF CABLE TELEVISION SYNDICATED PROGRAM EXCLUSIVITY RULES (DOCKET 20988)

When we issued our *Notice of Proposed Rulemaking* in this proceeding I voted enthusiastically for our proposals because I saw no basis in communications policy for continuing the syndicated exclusivity rules. The record in this proceeding has more than borne out my initial tentative conclusion.

I also voted to include in our *NPRM* a proposal providing for a transition period to ameliorate any dislocations resulting from the deletion of our rules. Given the evidence in the record, I have concluded that such a transition period is unnecessary.

The record indicates that of those cable systems subject to our rules, only 27 percent have been required to provide syndicated exclusivity protection. Other evidence demonstrates that even if all stations now entitled to program protection requested it, a maximum of 4.4 percent of all television households in the nation would be affected. This figure

[1] Separate Statement of Commissioner Joseph R. Fogarty, 71 FCC 2d 949-50 (1979). *See also Vanhu, Inc.*, Separate Statement of Commissioner Joseph R. Fogarty, 65 FCC 2d 991, 992 (1977).

would rise to only 9 percent under any reasonable projection of future cable development.

In light of the minuscule impact that a change in our rules will cause, I see no need to provide for a transition period. These rules have restricted consumer choices long enough without countervailing public interest benefit.

SEPARATE STATEMENT OF COMMISSIONER ANNE P. JONES

IN RE: REPORT AND ORDER IN DOCKETS 20988 AND 21284–CABLE TELEVISION SYNDICATED EXCLUSIVITY AND SIGNAL CARRIAGE RULES

I concur in the decision to eliminate these rules because I agree that the extensive record developed in these proceedings fails to show that they serve any valid public policy purpose. As well described in the Report and Order, the rules owe their existence to what now, with the benefit of hindsight, seems rather clearly to have been an exaggerated fear of the threat posed by cable television to television broadcasters and their ability to serve the public. The burden was therefore on those who would retain the rules to demonstrate the need or desirability fortheir retention in the public interest, and in my judgment this burden was not met.

The reason my vote is a concurrence is that I do not fully agree with the heavy implication in the Report and Order that for some years into the future the threat of harm to broadcast television by cable is negligible. Whether this is true depends in large measure on whether cable remains what it has been: primarily a retransmission mechanism. To the extent, however, that cable begins to realize its great potential as a mechanism for providing diverse programming, as well as myriad other services, it may be that our estimates of a maximum 48% market penetration and 10% audience diversion nationwide will prove too modest. I do not intend by this caveat to imply that if cable begins to pose a more substantial and immediate threat than the record shows it does now the Commission should respond, either at all or in any particular way. I merely say that I believe cable's threat to television broadcasting is more problematical than the language of the Report and Order seems to imply, although I fully agree that on the present record any such perceptible threat does not justify retention of these rules.

On the matter of retransmission consent, I wish to express my agreement with the conclusion in the Report and Order as to the effect of the 1976 amendments to the Copyright Act. I have carefully considered the arguments of NTIA and others and I continue to be troubled by the argument that the compensation required under the present statutory scheme by cablecasters to program owners is unreasonably low. I have concluded, however, that, Commission authority in this area has been preempted by the statutory compulsory

licensing scheme and arguments concerning the adequacy of the compensation to program owners under that scheme should be directed to the Copyright Tribunal or to Congress—and not to this agency.

Application, Unacceptable
FM Station, Limitations
Inquiry By FCC

Commission denies application to increase power and antenna height for noncommercial FM station. Proposed operation exceeds maximum allowed. Grant would restrict implementation of policy relating to improving the use of FM channels reserved for noncommercial educational stations.

FCC 80-343

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of Cincinnati University for modification of construction permit The Board of Trustees of the University of Cincinnati c/o Mr. Al Hulsen, Director and General Manager Radio Station WGUC-FM 1223 Central Parkway Cincinnati, Ohio 45214	File No. BPED-790601AJ

August 14, 1980

Gentlemen:

This is in reference to your application, File No. BPED-790601AJ, to increase your effective radiated power (ERP) and antenna height above average terrain from 32 kW and 600 feet, respectively, to 100 kW and 880 feet. This proposal represents a major change pursuant to Section 1.573 of the rules as the area encompassed by your 1.0 mV/m contour would be increased by greater than 50 percent.

Section 73.511(a) of the Rules effectively provides that commercial FM stations in the Cincinnati area will not be authorized to operate in excess of 50 kW ERP. This ensures the most efficient and equitable FM channel use. As you are aware, your proposal to operate with 100 kW ERP at a proposed transmitter site in Zone 2, exceeds the maximum of 50 kW allowed by Section 73.211 of the Rules. Authorization of your proposal is inconsistent with the 1968 general policy pronouncement of the Commission which bars such operation by noncommercial educational FM stations unless and until sanctioned by rulemaking. See *Moody Bible Institute of Chicago* FCC 79-86, 45 RR 2d 190 (1979); *Iowa State University of Science and Technology* 13 FCC 2d 751 (1968), *recon. den.*, 17 FCC 2d 496, 16 RR 2d 59 (1969). Moreover, the Commission is currently considering in Docket No. 20735 whether

certain maximum power limits should be imposed on noncommercial FM broadcast stations. *Notice of Proposed Rule Making*, FCC 76–240, released April 19, 1976; *Further Notice of Proposed Rule Making*, FCC 78–385, 68 FCC 2d 985 (1978). Thus, it appears that grant of your application would unnecessarily restrict the Commission's inquiry in Docket No. 20735.

Your engineering study alleges that special consideration should be afforded your application due to "unique coverage requirements in southwestern Ohio" and location of the proposed transmitter site in Zone 1 approximately 2 miles from the border of Zone 2 where a maximum of 100 kW is permissible under Section 73.211. Our rules limit the maximum power with which a station may operate so as to provide an orderly, efficient, and effective development of FM broadcast service. The Commission will not move the dividing lines defining appropriate power zones for the convenience of an applicant, even where proximity to the border of two zones is 2 miles. See *Stereo Corporation* 61 FCC 2d 76, 38 RR 2d 867 (1976). Further, longstanding Commission policy holds that the status of being a noncommercial FM operation is not, by itself, sufficient to justify exemption from our engineering standards. We have consistently held that emphasis must be placed upon the enduring allocation characteristics of a proposal rather than generally transitory programming.[1] See *Stereo Corporation, supra*. Grant of your application at this time would result in "grandfathering" a "super-power" facility based solely on existing program content and would intolerably restrict Commission flexibility to ensure the most efficient service in the future to as many communities as possible.

Accordingly,we conclude that a grant of the proposed application would not serve the public interest, convenience, and necessity. However, we will afford you thirty (30) days within which to modify your proposal to comply with Commission rules and policies. If such an amendment is not filed within the specified period, your application will be dismissed pursuant to Section 73.511(a). See *Notice of Inquiry* in Docket Nos. 14185 and 20735, *supra;* See also *Iowa State University, supra*.

By Direction of the Commission,
William J. Tricarico, *Secretary*.

[1] The thrust of these policies is underscored in the provisions of Section 73.511(a), a fact expressly recognized in your application. That rule states that applications in excess of the established power limits will not be granted as of right. Further, if rulemaking shows that the present power limits are inadequate, stations will be able to renew their requests for greater facilities. *Iowa State, supra*.

Authority Delegated, Action On
Political Broadcast, Program Time, Period
Political Candidate, Federal Candidate, Reasonable Access

Commission staff, through delegated authority, finds broadcaster's refusal to sell five-minute prime time segments to federal candidate reasonable. The timing of candidate's request, the number of potential similar requests, and the technical difficulty involved was significant in the determination.

Delegate Authority
35087

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by

Ed Noble for U.S. Senate Committee against Station KJRH, Tulsa, Oklahoma Concerning Political Broadcast

The Ed Noble for U.S. Senate Committee c/o Rosner Communications 19252 Pebble Beach Place Northridge, California 91326

Attention: Mr. James Rosner

August 20, 1980

Dear Mr. Rosner:

This is in response to your complaint filed on behalf of the Ed Noble for U.S. Senate Committee (hereinafter Committee) against television station KJRH, an NBC affiliate in Tulsa, Oklahoma. Mr. Noble is a candidate for the Republican nomination to the Senate in a primary election to be held August 26, 1980.

By mailgram dated August 1, 1980, the Committee filed a complaint with the Commission alleging that KJRH refused to make available to the Committee any five-minute program segments. The Committee stated that it first contacted the station on July 25, 1980 with its request for five-minute availabilities for the three-week period preceding the primary election which begins Tuesday, August 5 and ends Monday, August 25.

After receiving the complaint, we made an inquiry of the station through its attorney. Subsequently, KJRH relates, "in order to accommodate the candidate's current request, [the station] . . . changed its policy . . ." and informed the Committee that it would

offer a limited number of five-minute programs to the Committee. The Committee accepted the offer of most of the times made available but continues to press, at this time, its request for "all day parts, including prime time." On August 8, the Committee and counsel for KJRH filed comments with the Commission. On August 12, KJRH filed supplemental comments which were primarily factual in nature.

The following pertinent facts are not the subject of dispute. Station KJRH is one of three television stations in Tulsa, Oklahoma. The station's policy, prior to this complaint, was "to provide reasonable access to candidates for federal elective office by affording half-hour or hour program time in prime and non-prime hours, as well as spots in prime and non-prime hours."[1]

The station does not sell five-minute program slots to commercial advertisers.

The station has offered Mr. Noble and other candidates half-hour program time as well as spots in prime time and access times. The Noble Committee had purchased and the station was running a schedule of spots at the time that this complaint was filed.[2]

For financial and political strategy reasons, according to the Committee, it has not produced a half-hour campaign advertisement.[3] Prior to any contact with KJRH, the Committee produced a five-minute political program focusing on the candidate: "who he is, what he and his family have done for Oklahoma, his stands and in-depth understanding of world issues today, and why he is qualified to serve the people of Oklahoma as their United States Senator . . . ."

KJRH alleges that there are eleven Democratic candidates, five Republican candidates and three independent candidates for Senate on the ballot in the upcoming primary. There are also four candidates running for the U.S. House of Representatives.

When the station offered five-minute programs, the Committee bought most of the availabilities. The Committee booked a total of nine five-minute segments to be broadcast at 12 midnight, Friday and

[1] The "reasonable access" law is found at 47 U.S.C. 312(a)(7):

(a) The Commission may revoke any station license or construction permit . . .

(7) For willful or repeated failure to afford reasonable access to or to permit the purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[2] In its August 8 filing, KJRH indicates that the Committee purchased "27 spots in prime time, 5 spots in daytime and 7 spots in early fringe."

[3] In its August 8 transmission, the Committee cites the following factors behind its decision to produce only five-minute programs: "[F]or most political candidates, including Ed Noble, 30-minute and 60-minute programs are not a feasible alternative to five-minute programs. The cost of production for a quality program ranges between $4,000 and $6,000 per minute. Few congressional or U.S. Senate candidates can contemplate spending between $120,000 and $180,000 to produce a 30-minute program—and realistically, few candidates other than professional actors or extremely gifted amateur actors could sustain the viewers interest for 30 minutes."

Saturday nights, and on Sunday afternoons (2:55–3:00 p.m., August 10 and 24; 4:55–5:00 p.m. August 17) for the three weekends preceding the primary. The Committee notes that "sign on" and "sign off" were also offered to it but the offer was not explored.

The Committee argues that Sunday afternoon offerings are far inferior to prime time programming when measured by "total viewing audience reached." The Committee writes that from a media strategy point of view, "reasonable access usually means reaching a large percentage of the total viewing audience with enough frequency to adequately reinforce their initial impressions." The Committee continues, "[i]n the case of Ed Noble's five-minute program, frequency is not nearly so important a consideration as reach. The job of the five-minute program is to reach as many different viewers as possible at least once or twice in an effort to afford as many different people as possible an opportunity to judge Ed Noble's . . . background, personal accomplishments, values and character." The Committee asserts that "the only adequate way to achieve this kind of depth or unduplicated reach is in prime time, because it is in prime time that one finds the largest audiences available and many viewers watch only prime time television." The Committee estimates that in the short time remaining before the primary, it would require four prime time programs as well as the time already booked in order to consider a station's "reasonable access" obligations satisfied.

The station responds that if five-minute programs were available in prime time, six of the nineteen Senatorial candidates have indicated that they would be interested in purchasing the time.[4] The station writes, "KJRH would have to insert a total of 28 five-minute programs in prime time."

For its part, KJRH argues that it has afforded "reasonable" access to the Committee. "[i]t has accommodated his request for five-minute programs where the time has been available without serious impact on service to the public through the schedule disruption that would occur . . . if extended to prime time and prime time access." The station points out that the Committee made its request late in the campaign; it has offered to preempt programming for a 30-minute program but "[i]t is not willing to disrupt and fractionalize its schedule by selling 5-minute programs in those periods which are now divided into 30-minute segments"; and "the potential for substantial disruption" exists if other Senate candidates request comparable amounts of time.[5]

In addition, KJRH describes the "serious technical problems" involved in providing a five-minute segment to a political candidate:

> Delaying network programming, for five minutes is not technically feasible. KJRH

[4] In addition to the six candidates who expressed interest in five-minute time blocks, KJRH reports that five candidates were not interested and eight candidates could not be located.

[5] See Footnote 4, *supra* and accompanying text.

> would have to tape the entire network schedule and present it on a five-minute delayed basis throughout the evening. The station has the capability for handling five to ten second delays by looping tape—using two tape machines side-by-side and recording on one machine, looping the tape to the floor, and playing back on the other machine. There is no way for the station to handle a five-minute delay in the same manner because the tape is run at 15 inches per second and five minutes of attempted looping would result in several hundred feet of tape on the floor. [An alternative] process would involve taping 2-½ minutes on one machine and then rewinding and rescuing in the next 2-½ minutes to get the first tape on the air and repeating this throughout the evening schedule. It is a process that is simply not feasible.

The station contends that in order to accommodate a five-minute program, it would have to "(1) cut a consecutive five minutes out of the body of the program at the beginning or at a break or, (2) drop the entire scheduled network program and fill in the remaining 25 minutes with filler programming. KJRH has no such programming suitable for prime time."

In order to insert a five-minute program in access programming, the station would have to cut five minutes from the regular program or cut all commercials from a half-hour segment. KJRH reports that political spots have been scheduled in the access periods between now and the election and these spots cannot be deleted.

KJRH argues that "excessive production costs" cited by the Committee could be decreased by having the candidate appear live. The licensee also compares the rates for thirty-minute program time with rates for five minutes and concludes that they "compare favorably."[6]

Station KJRH rests its stand firmly on Commission precedent (*Honorable Donald W. Riegle*, 59 FCC 2d 1314 (1976)) and argues that no subsequent rulings or opinions have altered the outcome of that case. In *Riegle*, a candidate for the Democratic nomination for Senator from Michigan sought to buy five-minute prime time program times on WKZO-TV in Kalamazoo. The station offered to sell five-minute program slots only on Saturday and Sunday afternoons, although they made available half-hour programs in prime time as well as spots in prime time. The candidate asserted that in order to introduce himself to voters statewide, he needed to broadcast a series of five-minute programs in prime time, and he could not afford to purchase and produce thirty-minute programs for use on that station. The station replied that the broadcast of five-minute programs in prime time would severely disrupt its scheduling and it contested the financial and strategic disadvantages alleged by the candidate. In short, the station insisted that its sales policies did constitute reasonable access for political candidates.

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[6] A thirty-minute prime time program costs $1,200; five minutes costs $900. A 30-second spot costs $400. In the access period, the rate for a thirty-minute program is $1,000 and for a five-minute program, $750. The Committee pays $450 for each five-minute program on Sunday afternoons, and $150 for the weekend late night bookings.

The Commission held in that case that the station's policies were not unreasonable. Noting that the station had offered both program times and spot announcements in prime and access times, as well as five-minute programs at other times, the Commission wrote to the candidate, "[w]e respect your belief that the opportunities which the licensee offers you are not best suited to your planned campaign, but it does not appear that they can be considered unreasonable under Commission precedent and the facts of this case."

We are not persuaded by station KJRH's reliance on *Riegle*, or its claim that no subsequent rulings or opinions have altered the outcome of that case. Actually, in the years since 1976, the Commission has substantially elaborated on its interpretation of Section 312(a)(7). Although in 1976, one possible interpretation of *Riegle* may have been that flat bans on the sale of five-minute prime time program time to candidates may be reasonable, subsequent Commission decisions make it clear that such an interpretation is no longer possible.

We refer particularly to the Report and Order on *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079 (1979) *(Policy Statement)* and the series of decisions loosely termed "the Carter-Mondale decisions." (*Carter-Mondale Presidential Committee, Inc.*, 74 FCC 2d 657, 46 RR 2d 899 (1979) *(Carter-Mondale*

When considering the Policy Statement in 1978, the Commission decided that because of the varying factual situations likely to arise, it would not issue "formalized rules," but rather it would suggest "guidelines . . . to clear up confusion expressed by candidates and licensees and to ensure that the Congressional intent in enacting Section 312(a)(7) is fully realized." 68 FCC 2d at 1089. Among those guidelines were the statements that "reasonable access" requires that licensees provide prime time program time to legally qualified candidates absent unusual circumstances, and, in all cases, that they provide prime time spot announcements. *Id.* at 1094. The Commission also said:

> We believe it to be generally unreasonable for a licensee to follow a policy of flatly banning access by a Federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers. [Footnote omitted]. We feel certain that Congress in granting Federal candidates a specific right of access to a station wished such candidates to be at least on par with commercial advertisers who have no such access rights. Except for prime time, this does not necessarily mean that a licensee must always allow a candidate access to every class and length of time. In tailoring access to meet the needs of candidates for a particular office, licensees may consider such factors as the unavailability of particular classes of time; a multiplicity of candidates; the specific desires of candidates; etc. However, an arbitrary "blanket" ban on the use by a candidate of a particular class or length of time in a particular period cannot be considered reasonable. A Federal candidate's decisions as to the best method of pursuing his or her media campaign should be honored as much as possible under the "reasonable" limits imposed by the licensee. *Id.* at 1090.

This paragraph, and especially the last sentence, were the subject of some discussion when the Commission, and subsequently the courts,

considered a request by the Carter-Mondale Presidential Committee to buy a half-hour of time from the networks to kick off the President's reelection campaign on November 1979.

In the Commission's first order discussing the case, it noted that particular emphasis should be placed on the candidate's needs. The Commission stated:

> In taking this factor into account, the licensee is not simply to substitute its judgment regarding the candidate's needs for the candidate's own assessment of those needs, but of those needs, but the licensee does retain some discretion to evaluate the reasonableness of that assessment in the broad sense and to weigh that factor against other factors which we have said are relevant . . . . [W]e recognize that an offer of prime time program time itself is not enough. The candidate must also be afforded flexibility to address the prime time audience in the manner best suited to his campaign. [*Carter-Mondale I*, 74 FCC 2d at 642–643.]

Upon reconsideration, the Commission responded to the broadcasters' objections that the initial opinion had the effect of substituting the candidate's judgment for that of the licensee. The Commission pointed out that it was charged with effectuating the purpose of Section 312(a)(7) and in doing so, it was required to review the reasonableness of broadcasters' decisions, 74 FCC 2d at 672. The Commission cited "the dual notions of deference to broadcaster discretion and broadcaster accountability." It held that in addition to the criteria mentioned in the Policy Statement and relied upon by the networks to deny the candidate's request (timing, multiplicity of candidates and programming disruptions) which relate primarily to broadcasters' needs, broadcasters must consider the "countervailing factor in the balance"—the individual needs of the candidate. *Id.* Furthermore, "a broadcaster should not 'second guess' the 'political' wisdom or relative audience-attracting effectiveness of longer versus shorter formats in determining the 'reasonableness' of a candidate's request." *Id.* at 667. In addition to the "public interest factors" cited by the broadcasters to justify their denial of time, "a broadcaster should be required to demonstrate the extent to which he has attempted to tailor his offer of airtime to be as reasonably responsive as possible (given countervailing factors) to a particular candidate's stated purpose in seeking airtime."[7] *Id.* at 668.

When the D.C. Court of Appeals took up the case, it listed the following factors which appeared, in the eyes of the Commission, to be appropriate considerations for broadcasters when weighing a candidate's request for time:

> (a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of

[7] This requirement is different from a judgment about "candidates' needs in general" with the "blanket determinations" that often attend such an approach. "Such a standard could too easily allow decisions based on a broadcaster's own convenience or economic interest to be couched in terms of amorphously defined candidate needs." *Id.* at 672.

regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request. [*CBS* v. *FCC*, *supra*, slip op. at 32.]

Therefore, although KJRH cites the *Riegle* case as precedent for the reasonableness of its decision, licensees cannot rely on *Riegle* as authority that bans on the sale of five-minute prime time program time to candidates are permissible. Rather the licensee must attempt to honor the media plans of individual candidates as much as the circumstances surrounding the individual request permit and "must articulate with clarity the basis of his decision." *CBS* v. *FCC*, *supra*, *slip op.* at 37. In this connection, the Commission is more persuaded by the licensee's analysis of the circumstances which do not permit to honor this candidate's request than we are by its citation of *Riegle*.

First, KJRH points out that it has taken the candidate's specific request into account by altering its commercial policy and selling some five-minute program segments and by making a number of such segments available to the candidate. It also points out that it made a counter offer of a thirty-minute prime time program. It adds that it has made available to the candidate all classes and lengths of time requested by the candidate. It has been unable and unwilling, however, to sell only one particular length of time in prime time. Second, it explains in detail the technical difficulties inherent in providing a five-minute prime time segment to a political advertiser during the run of a network feed. Third, it explains that, while the prime time access period does not pose the same technical problems attendant on network broadcasting, all commercials in a half-hour segment would have to be eliminated and the program run straight through. In this case some of the available commercial times have already been sold to other political candidates. In this context, KJRH emphasizes that the Committee's request for five-minute programs was made late in the campaign. KJRH's final argument is that 23 other federal candidates might be eligible to buy similar programs if it were to grant the Noble Committee's request for prime time.

Of particular significance in our determination here was the timing of the request in light of the number of potential requests which granting that request would precipitate and the technical difficulty involved. It is possible that if the Committee's request had been received with sufficient "lead-time" the outcome might well have been different. As the court in Carter-Mondale said, "[i]f a request is made months in advance, denying it is more unreasonable than it would be if it is made only days before the proposed broadcast." Here the candidate waited until ten days before the requested start date for a three-week schedule ending the day before the election. Twenty-three other federal candidates would be eligible to buy similar programs. Six senatorial candidates have indicated an interest in five-minute prime time placements. Assuming only these six bought time, the sale of 24 five-minute segments would significantly disrupt the station program-

ming. This is particularly true in view of the technical difficulties involved in dealying network programming. Had the stationbeen given more notice, it might have been able to work out those difficulties. For example, it might have preempted one-half hour of network time and filled the remaining 25 minutes with local programming or with other candidates' programs.

With better planning, the Committee might have reached many of the prime time viewers by booking times during the prime time access period. Although the prime time access period does not raise the technical problems posed by network programming, all commercials in an access half-hour segment would have to be eliminated and the program run straight through. In this case some of the available commercial times have already been sold to other political candidates. It appears that the licensee has done the best it can at this late date. The candidate is reaching the public during prime time with spots, and the five-minute program is being aired although not in the time periods that are the first choice of the candidate. Further, the candidate can reach the prime time audience by accepting the half-hour offer.

In light of the circumstances, the Commission cannot find that the licensee has failed to follow the guidelines set out by the *Carter-Mondale* decisions. There are significant differences between the circumstances leading the court and the Commission to find the networks unreasonable in the Carter-Mondale case and the circumstances here.

The candidate here is not a presidential candidate and the station is not a network.[8] The licensee has not made a "blanket determination" that it would not offer a particular class or length of time to political candidates; it offers all classes and lengths of time requested by the candidate at various times throughout the broadcast day. This is not the candidate's first request for time; the station has already sold a large amount of time in the form of spot announcements, most of them in prime time, to the candidate. Finally, the candidate did not request time two months in advance of the date he hoped to appear; instead he waited until about 10 days before he hoped his three week schedule of programs would begin to run. His "run" of programs was not planned for a time months before the election; instead it was planned for three weeks before the crucial election.

In view of the above, the Commission is satisfied that because of prior bookings in the busy period immediately preceding the primary,

[8] A significant aspect of the *Carter-Mondale* decisions is the acknowledgement "the networks, unlike other broadcasters, have only one group of candidates to serve—presidential candidates." *Carter-Mondale I*, 74 FCC 2d at 647. On the other hand, local stations must sell to congressional candidates, often in many districts, sometimes in a number of states, and may sell to state and local candidates in important races as well.

the station is unable to grant the Noble Committee's first choice of program time. Therefore, we do not find their decision unreasonable.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

SINCERELY,

STEPHEN F. SEWELL, ACTING CHIEF,
COMPLAINTS AND COMPLIANCE DIVISION,
BROADCAST BUREAU.

cc: KJRH
Counsel

Educational Noncommercial TV Station, License Renewal, Granted Conditionally

Renewal application of educational TV station conditionally granted. Licensee must establish a full studio in station's city of license, maintain a public file at station's facilities, and utilize local recruitment sources. BC 78–181

FCC 80–464

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of	
EDUCATIONAL BROADCASTING CORPORATION	Bc Docket No. 78–181
For renewal of license for Station WNET(TV) Newark, New Jersey	File No. BRCT-329

MEMORANDUM OPINION AND ORDER

(Adopted: July 31, 1980; Released: August 20, 1980)

BY THE COMMISSION: COMMISSIONER JONES CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. The Commission has before it the above-captioned license renewal application of Educational Broadcasting Corporation ("EBC") for Station WNET(TV), Newark, New Jersey, EBC's "Newark, New Jersey Studio Proposal and Description of New Jersey Programming Efforts" filed on January 28, 1980, a "Response" to EBC's submission filed by the New Jersey Coalition for Fair Broadcasting ("Coalition") on March 17, 1980, EBC's responsive "Comments" filed April 7, 1980, supplementary information filed by EBC on May 30, 1980,[1] and the Coalition "Response" to that information, filed July 8, 1980. Commission action on EBC's pending application is taken herein pursuant to the directives issued in our *Order* of March 14, 1979, 70 FCC 2d 2204, 45 RR 2d 381, ("March *Order* "), and our *Order* of November 27, 1979, 74 FCC 2d 414, 46 RR 2d 1977 ("November *Order*").

Background

2. The saga of WNET's service to New Jersey, beginning with our decision in *NTA Television Broadcasting, Corp.*, 44 FCC 2563 (1961) *("NTA")*, is at this point well-known. The pertinent history and facts were thoroughly discussed in our March *Order*, *supra*, and our

[1] That supplementary information included a proposed lease for roughly one-half of the Gateway space considered herein, which was not executed at the time. That least was executed on June 4, 1980, and submitted to the Commission on June 27, 1980.

November *Order*, *supra*. Therefore, we confine the present background discussion to our determinations in the above *Orders*, and EBC's action pursuant to those *Orders*.

3. In our March *Order*, *supra*, we considered EBC's renewal application for WNET, as supplemented at that time, and various petitions to deny that application.[2] A primary issue in our consideration, and that which concerns us here, was the adequacy of EBC's Newark studio facilities. In its application, EBC claimed access to three Newark studios: 1) a fully equipped color studio leased from Essex County College, 2) the Newark studios of the New Jersey Public Broadcasting Authority, and 3) WNET's office space at the Gateway Building in Newark, which had no permanent equipment, but was convertible to a studio in approximately one hour by use of equipment from a mobile van. EBC contended that these facilities met the *NTA* requirement of "fully adequate studio facilities" in Newark, "fully capable of presenting programming." It further argued that it had no responsibility beyond this maintenance of the "availability of a program origination capability in Newark." The Commission however, found that developments since *NTA*, particularly the *New Jersey Rulemaking*,[3] had modified WNET's obligations, making the mere "availability of program origination capability" inadequate. We determined that:

> "in order to support the continued viability of the main studio location waiver granted in 1961, WNET must maintain a fully adequate facility in Newark, consistent with the letter and spirit of the *NTA* decision and commensurate with the physical presence concept of the *New Jersey Rulemaking*. This requirement goes beyond the *NTA* mandated studio capable of effectuating WNET's New Jersey programming. EBC's New Jersey presence must be a functional extension of the licensee, a visible, accessible and fully staffed facility, capable of and regularly used for the production of licensee's New Jersey programming." March *Order*, *supra* at 2241.

The Commission concluded that WNET's current arrangements did not fulfill that obligation. Consequently, the Commission declined to renew WNET's license at that time, and explicitly conditioned any future grant of WNET's license on maintenance of a "fully adequate facility in Newark, New Jersey, commensurate with the letter and spirit of the *NTA* decision and the *New Jersey Rulemaking*." [4] *Id.* at 2248. We required that EBC submit an amendment to its application, "fully describing the office and studio facility the licensee proposes to establish in its city of license, Newark, New Jersey, the steps it intends to take to establish that facility, and the time-table for the establish-

[2] EBC's request for permission to relocate WNET's main studio was also considered and granted.

[3] Docket No. 20530, 58 FCC 2d 790, 59 FCC 2d 1386, 62 FCC 2d 604 (1976).

[4] Additional conditions were the maintenance of a complete local public file at WNET's Newark facilities, as well as its New York City facilities, and the maintenance and regular usage of its employment recruitment sources in New Jersey.

ment of that facility." *Id.* at 2248. All petitions to deny were denied, except to the extent that the *Order* redefined the role of WNET in terms of its service obligations to New Jersey and its obligation to establish and maintain a physical presence in New Jersey.[5] Thus, this New Jersey studio inadequacy was the only remaining impediment to grant of the license renewal application for WNET.

4. In response to the March *Order, supra*, EBC submitted an amendment to its renewal application on May 14, 1979, with the proposal that 1) WNET lease Essex County College's studio facilities and equipment; 2) WNET continue to lease space at the Gateway Building in Newark for use as WNET's New Jersey headquarters, containing offices, a meeting room and a production studio; and 3) WNET make substantial additions to its existing Gateway staff.

5. In our November *Order*, we found this proposal by EBC inadequate because the provisions of the contract with Essex provided that WNET's use was not to interrupt the college's scheduled curriculum, and there was no provision guaranteeing that WNET would have access to the Essex studio on nights, weekends, or vacation periods. Also, there was no firm commitment of specific periods of time available to WNET; and the procedure established for resolving conflicts over use at particular times was designed so as to favor Essex's first right to the use of its facilities. Thus, WNET's proposal did not provide WNET with reasonably unimpaired access to its New Jersey facilities. The Commission found this unacceptable, concluding that "[i]n order to comply with its New Jersey presence requirements, WNET must have unimpaired, non-preemptible access to its New Jersey facility. This consists of reliable access to a studio both to produce regularly scheduled local shows and to go on-the-air on short notice to cover late-breaking local stories." November *Order, supra* at 429, 430. EBC was ordered to submit a new proposal in accordance with that directive. EBC was also requested to submit an updated description of WNET's New Jersey programming.

6. On January 28, 1980, EBC submitted its "Newark, New Jersey Studio Proposal . . ." On March 17, 1980 the New Jersey Coalition for Fair Broadcasting submitted a "Response" to EBC's proposal, criticizing it as inadequate on several grounds. EBC responded to those charges with its "Comments" filed on April 7, 1980. With this new proposal, EBC substantially revamped its approach to establishing its New Jersey presence by providing for its own fully staffed and outfitted studio facilities at the Gateway Building in downtown Newark. Several points of EBC's new proposal were insufficiently spelled out, and by letter of April 30, 1980, the Broadcast Bureau

[5] The other issues advanced by the petitioners concerned WNET's programming, its equal employment opportunity program, and its request to relocate its main studio.

requested certain clarifications and additional information to provide a sufficient basis upon which to evaluate the proposal.[6] That additional information was filed by EBC on May 30, 1980. EBC's January 28, 1980 proposal and its May 30, 1980 letter will be considered and referred to together simply as the "Proposal."

EBC's Proposal

7. For the first time since *NTA*, *supra*, WNET proposes to consolidate its presence, programming capability and other New Jersey operations (with the probably exception of nightly news production)[7] in one Newark home—a single, independent facility, under its own control, providing a permanent identifiable WNET existence in the community.

8. First, the proposed location complies with our requirement that WNET's facility be accessible to Newark residents. It is located on the first floor of the Gateway Building in the heart of the downtown area of Newark, within easy walking distance of Penn Station.

9. Next, the premises under lease appear to provide a suitable production capability and functional extension of the licensee. The executed leases submitted by EBC supply WNET with nearly 9,000 square feet of usable space (over 10,000 square feet total). A blueprint submitted by EBC shows floor plans for offices, a production studio, a control room, a lighting and equipment storage room, a reception and guest viewing area, a dressing room and green room, a video tape room, and space for future expansion. EBC states that the Gateway facility will be linked by microwave to the WNET transmitter.[8] It claims that Gateway will incorporate the latest compact television production equipment, enabling it to produce and broadcast its regularly-scheduled New Jersey-oriented programming (other than the *New Jersey Nightly News*, see fn. 6 above), and to present on-air coverage of late-breaking stories which may be broadcast live at any time.[9] EBC has also submitted the statement of consulting engineer

[6] That letter requested information as to the actual conditions and length of the lease for the Gateway space, WNET's plans to visibly identify and promote its Newark facility, the specific measurements of its final floor plan, the specific responsibilities and deployment of the Newark staff, the adequacy of the "on call" arrangements for its technical crew, whether the *Nightly News* would be produced at Gateway if agreement were not reached for its coproduction with NJPBA, and a full description of the timetable for the implementation of its proposal to ensure operation by the February 1, 1981 deadline.

[7] WNET anticipates that the *New Jersey Nightly News* will continue to be coproduced with the New Jersey Public Broadcasting Authority, at the Authority's studios in Newark and Trenton.

[8] EBC's lease appears to prohibit the attachment of microwave equipment to the building, absent the written consent of the lessor. We have no evidence of such consent. Our action taken herein presumes EBC's ability to acquire that consent, or make other arrangements for an interconnection with its transmitter.

[9] The licensee's proposal provides, *inter alia*, for: three modern high-sensitivity studio color cameras using 12:1 zoom lenses, chromakey option, a 3x3 fixed lighting grid

Elmer Smalling (President of Jenel Corporation) that WNET's microwave link renders it operationally equal to the New York studio, and that the Gateway facilities will serve WNET's present and future needs; and that of telecommunications consultant Neil M. Smith that all normal items have been included, that the equipment reflects the current state of the art, and that the Newark facility is capable of producing high technical quality programming equivalent to that of WNET's New York studio. EBC asserts that any modification of its final plan will neither be substantial nor reduce the overall proposed effectiveness of the broadcast plant.

10. WNET is guaranteed unimpaired, non-preemptible access to its facility by the execution of long-term leases for the Gateway space, with WNET as the only tenant in that space. The lease for approximately one-half of the space runs until June 30, 1987, with an option until July 31, 1991; the lease for the other one half of the space runs until July 31, 1991.

11. EBC states that Gateway will be "appropriately" staffed by eleven full-time and five part-time employees. Oversight of all of WNET's New Jersey activities, including supervision of all New Jersey-based employees, New Jersey fundraising activities, and New Jersey recruitment efforts, will be vested in the Vice President of New Jersey Operations. This Vice President will spend 70% of his time at Gateway, and another 15% at field locations in New Jersey.[10] A Community Affairs/Development Coordinator will be employed to conduct on-going ascertainment and to foster "grass roots" contact with Newark and New Jersey residents. This Coordinator will spend 80% of his time at Gateway and 20% at other locations in New Jersey. There will also be a Development Coordinator working 60% at Gateway and 20% at other New Jersey locations, and an Administrative Assistant (office manager/secretary) and full time and part-time (relief) receptionists working exclusively at Gateway. Further, WNET proposes to base the seven-member production crew for *Dateline: New Jersey* at Gateway. This crew is comprised of a full-time executive producer, two full-time producers, two full-time production assistants, and a part-time (six weeks) free-lance producer and part-time (six

with modern lightweight fixtures, a makeup/dressing room with makeup facilities, sink and clothing storage, an assortment of microphones, intercom for all crew members, an interrupted feedback system, camera prompters, remote control pan/tilt for one camera, guest viewing room with sound proof windows, a control room with intercoms accommodating seven crew members, a video control and transmission position with described equipment, monitor wall with the ten monitors, a long production console, a described production switcher, "Down Stream Keyer," audio console, audio equipment rack, auxiliary audio equipment, audio patch panel, elevated producer's platform, character generator and preview monitor, video tape and casette room, described one-inch VTR machine, automatic casette edit pair, video tape storage, and a Gateway video and audit output connected directly to the WNET transmitter by microwave link.

[10] Employee time not accounted for presumably is spent outside New Jersey.

weeks) production assistant. Additionally, the facility will have a full-time video engineering supervisor who will assume responsibility for the maintenance and operations of the technical plant at Gateway. WNET states that this video supervisor will have "at his call at all times technical crews for the production and broadcast of New Jersey programming."[11] In addition, WNET contemplates a part-time School Television Coordinator (four hours per week at Gateway, four hours at other New Jersey locations) and a part time Employment Coordinator (four hours per week). Finally, WNET plans to utilize two full-time and thirteen part-time volunteers (from Friends of Thirteen), seven part-time volunteer photographers in the field, and two student interns (full-time summer, part-time otherwise). These staffing plans appear to be adequate to fulfill WNET's needs for the production of its New Jersey-oriented programming.

12. EBC's plans to make WNET's presence in New Jersey more "visible" to its public are less certain. WNET's logo will remain displayed within the lobby of the Gateway Building, but its lease specifically prohibits the exhibition of the logo, or any other sign, on the outside of the building. EBC states that it intends to seek an exception to this provision, but there is no indication of the likelihood of its success. EBC also states that it is anticipating the placement of a sign within the enclosed walkway connecting the Gateway building to Penn Station, and that it is investigating the rental of poster islands within Penn Station. It is also "considering amking application" to the New Jersey Council on Advertising for a multimedia promotion campaign. EBC will continue to specify Newark, New Jersey in its required hourly on-air station identification announcements, and upon completion of the Gateway renovations, will carry on-air announcements (of an unspecified nature, frequency and duration) regarding its enhanced New Jersey presence. Finally, WNET will continue to issue

[11] The video engineering supervisor will draw personnel from the manpower scheduline office. If personnel are required on an expedited basis, the video engineering supervisor will first seek to contact several of the 27 of WNET's 69 technicians who reside in New Jersey. Should additional personnel be required, the supervisor will be able to draw upon personnel who are on duty and are able to be re-assigned, or those who reside outside of New Jersey. The full-time video engineering supervisor will have the telephone numbers of all WNET technicians and will be capable of assembling a crew upon extremely short notice.

EBC supplies the affidavit of its Director of Engineering and Operations at WNET, which states that he has consulted with persons in equivalent positions at WABC-TV, WCBS-TV, and WNEW-TV. Each of them confirmed that the technical staffing procedures in the Proposal reflect industry practice, that their respective operations are similar and adequate for production and airing of regular and late-breaking broadcasts, and that none of those companies maintain in-house technicians on standby for unanticipated developments.

EBC also states that its investigation did not reveal any television broadcast station which maintains in-house technicians on an around-the-clock, standby basis. EBC further claims that this is the same procedure that is employed by WNET(TV) at its New York City studio.

press releases detailing its Newark studio plans, and "Community Alert" notices[12] with information of activities at the Newark and New York City studios. Because of the vagueness of these proposals, our action herein is taken with certain reservations. Specifically, WNET will be required to submit with its next renewal application, detailed information regarding the effectuation of its proposal, and any other definite plans, to enhance the visibility of its Newark operations. This will include, but is not limited to, further information about its on-air publicity, and information regarding its progress in securing permission to display its logo, or other sign, on the outside of the Gateway Building or at another location in close proximity to the Gateway Building.

13. Finally, EBC has submitted a rough timetable which indicates that it will take approximately 47 weeks to implement this Proposal, after it is approved by the Commission. EBC requests that, in view of the delay in securing Commission approval for the Proposal, we grant an extension beyond the February 1, 1981 deadline for initiation of operations from Newark, which was set in the November *Order, supra.*

Coalition's Objections

14. In its Response, the Coalition has argued that EBC's Newark studio proposal is inadequate. It claims that the Gateway studio will not support the nature and scope of New Jersey programming that the Commission has ordered EBC to provide. This allegation is based solely on what the Coalition characterizes as the "negligible programming 'designed to serve New Jersey' " in EBC's Proposal. It charges that EBC "apparently has no intention of integrating that facility into its regular programming or expanding 'its programming designed to serve New Jersey.' " It also charges that EBC has no firm commitment to completion of the proposal, as the source of funds appears to be contributions by New Jerseyans, and as there is no definite completion date. Further, the Coalition states that EBC will discontinue *Dateline: New Jersey* and that it failed to inform the Commission that it had applied for federal funding. Finally, it proposes that EBC create a major broadcast production facility in Newark, to be staffed and managed by EBC, and funded by the major VHF stations in New York City and Philadelphia and/or a consortium of New Jersey businesses. This facility could be made available for lease when not in use by EBC.

15. In our March *Order, supra,* we specifically addressed the issue of WNET's New Jersey-oriented programming, in the context of petitions to deny, and found that it was adequate. EBC's updated programming description shows that it has not changed significantly since that time. The Coalition has provided no basis upon which we should now conclude that it is insufficient or "negligible." It advances no evidence regarding WNET's alleged intentions not to integrate its

[12] These notices are sent to approximately 500 community leaders and groups.

Newark facility into its regular programming, and the effort and expenditure adopted by EBC to create this facility imply just the opposite. We consider the Coalition's allegation as to the discontinuation of *Dateline: New Jersey* speculative. Moreover, in that National Telecommunications Information Administration grants require matching funds, there has been no misleading representation by WNET. If it appears in the future that WNET is failing in its responsibility to serve New Jersey despite the availability of its studio in Newark, appropriate action can be taken. The Coalition has submitted no evidence or argument to challenge any of our conclusions regarding the physical adequacy of EBC's production facility to serve as an extension of the licensee in Newark. In its fundraising effort to cover the cost of the renovations at Gateway, and that if this is only partially successful, the remainder of the expenses will come out of WNET's discretionary funds. We find this commitment adequate at this time. In that same letter, EBC provided a timetable outlining the need for approximately 47 weeks to complete the renovations at Gateway. Furthermore, our own firm deadline, as specified below, is sufficient assurance that EBC will complete its plans. Finally, EBC is obliged in no way to provide any production facility beyond that required to fulfill its own needs to serve its New Jersey viewers.

Conclusions

16. As discussed above, the Proposal submitted by EBC satisfies the directives of our March *Order*, *supra*, and our November *Order*, *supra*. It will provide WNET with fully adequate studio facilities in Newark, as required by *NTA*, *supra*, and establish WNET's definitive presence in Newark in accordance with the *New Jersey Rulemaking*, *supra*. WNET will have unimpaired access to and complete control over its singular integrated Newark facility. Although the delay in our consideration of this Proposal was caused by the extensions of time granted to EBC[13] and the inadequacies of EBC's January 28, 1980 proposal which necessitated additional correspondence, we will extend the deadline for EBC's implementation of its Proposal to June 1, 1981. This date is based on the tentative time-table submitted by EBC and the expiration date of the license renewal we are granting herein. Furthermore, this license renewal application is granted with the expectation that EBC will fully implement its Proposal by the deadline; moreover, another license renewal will not be granted in the absence of actual operations by WNET from its Newark facility. We are also requiring that a full report on the current progress be submitted with WNET's next renewal application, on or before February 1, 1981.

17. The description of WNET's overall New Jersey programming

[13] EBC was granted a thirty day extension of time to respond to our November *Order*, and a fifteen day extension to reply to the April 30, 1980, letter from the Broadcast Bureau.

requested in the November *Order*, *supra*, demonstrates adequate New Jersey oriented programming at this time. The availability of EBC's Newark studio is intended to facilitate productions of regular and special New Jersey programming.

18. Accordingly, IT IS ORDERED, That the above-captioned application for renewal of license by Educational Broadcasting Corporation for Station WNET(TV), Newark, New Jersey IS GRANTED, subject to the following conditions, as ordered in our March *Order*, *supra*:

(a) That the licensee maintain a fully adequate facility in Newark, New Jersey, commensurate with the letter and spirit of the *NTA* decision and the *New Jersey Rulemaking*.

(b) That the licensee maintain a local public file at both its main studio in New York City and at its Newark facility to be established and maintained pursuant to condition (a) above, and both such files shall contain all materials required by Section 73.3527 of the Commission's Rules.

(c) That the licensee maintain its recruitment sources in the State of New Jersey and regularly utilize those sources in its recruitment efforts.

19. IT IS FURTHER ORDERED, That Educational Broadcasting Corporation submit with its next renewal application for Station WNET(TV) (on or before February 1, 1981) complete information regarding its progress in the implementation of its Proposal considered above.[14]

20. IT IS FURTHER ORDERED, That Educational Broadcasting Corporation advise the Commission, in writing, of the completion of the renovations to its Gateway facility, and the initiation of operations from that location.

21. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail - Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION,*
WILLIAM J. TRICARICO, *Secretary*.

[14] This information should include a report on WNET's planned microwave or other link between Newark and its transmitter, and a more specific report on its plans for identifying and promoting its Newark facility.

* See attached Statement of Commissioner Anne P. Jones.

STATEMENT OF COMMISSIONER ANNE P. JONES DISSENTING IN PART

IN RE: APPLICATION OF EDUCATIONAL BROADCASTING CORPORATION FOR RENEWAL OF LICENSE FOR STATION WNET (TV), NEWARK, NEW JERSEY

I dissent from the condition imposed on this renewal of WNET's license.

As I said in my dissent from the Commission's action on this application last fall, I cannot support imposition on WNET of a "bricks and mortar" requirement which I believe will prove at best useless and at worst counterproductive.

It would, of course, be desirable for WNET to have a substantial "physical presence" in Newark, its city of license. The problem is, as WNET has repeatedly argued to the Commission, that such a presence consumes resources better spent on programming.

In paragraph 18 of its order the Commission finds, as it has in the past, that WNET's overall New Jersey oriented programming is adequate. If this is so, I do not see why we continue harassing this licensee and imposing unnecessary costs on it.

Employment, Minority, Acceptable Level Of By Licensee (EEO)
Reconsideration, Petition, Denial Of
Rule Making, Petition For Denied

Petitions for rule making and reconsideration of revised equal employment opportunity (EEO) processing guidelines denied. Commission states that revised guidelines are not substantive in nature and do not require rule making, are screening devices determining which applications receive staff review for EEO compliance, and are reflective of industry employment trends.

FCC 80-389

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants.	RM-3635

MEMORANDUM OPINION AND ORDER

(Proceeding Terminated)

(Adopted: July 1, 1980; Released: August 18, 1980)

BY THE COMMISSION: COMMISSIONER WASHBURN APPROVING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT.

1. Before the Commission is a petition for reconsideration of its revised equal employment opportunity ("EEO") processing guidelines, FCC 80-61, February 13, 1980, filed by the National Association of Broadcasters ("NAB").[1] Also before the Commission is NAB's petition for rule making, RM-3635, filed as a separate element of the same pleading as the petition for reconsideration.[2]

2. NAB makes three major arguments in favor of a grant of reconsideration. Its first contention is that the guidelines are substantive requirements which were improperly adopted without the benefit of the "notice and comment" rule making procedures of Section 553 of the Administrative Procedure Act, 5 U.S.C. §553. NAB submits that had the Commission followed these procedures, it would have also been

[1] By *Order*, FCC 80-211, adopted April 11, 1980, released April 17, 1980, the Commission denied NAB's jointly-filed request that we suspend the April 1, 1980, effective date of the guidelines pending action on the petition for reconsideration now before us.

[2] Public Notice of the filing was given on April 11, 1980 (Report No. 1223).

forced to consider a number of serious questions regarding the purpose and function of the processing guidelines and the extent of its EEO-related jurisdiction.

3. NAB's second argument is that the guidelines are "discriminatory, unfair, and unrealistic," in part because they do not properly take into consideration the actual workforce availability of women and minorities in the top four FCC Form 395 job categories.[3] Finally, NAB suggests that the adoption and rapid implementation of the new guidelines were "unwarranted" and ignored "the broadcast industry's EEO-related good faith efforts."

4. The last paragraph of NAB's pleading requests that the Commission initiate a rule making proceeding to

> . . . reassess its entire EEO regulatory program—processing standards and substantive rules and policies—with a view toward examining its own jurisdictional limitations, the true workforce availability of top four minority and women employees, and the good faith EEO-related efforts of the broadcast industry.

As the petitions for reconsideration and for rule making are but two elements of the same pleading, raising the same issues in different procedural forms, we deem it appropriate to address both petitions in this *Memorandum Opinion and Order*.[4]

Background

5. The revised EEO processing guidelines replace guidelines adopted March 9, 1977, which were applied to all renewal applications due on or after April 1, 1977. The revised guidelines provide that station EEO programs will receive in-depth review by Commission staff under the following circumstances: (a) stations with five to ten full-time employees—if full-time employment of minorities and/or women is not at a ratio of at least 25 percent in the top four FCC Form 395 job categories and 50 percent overall when compared to the presence of these groups in the relevant labor force; (b) stations with 11 or more full-time employees—if full-time employment of minorities and/or women is not at a ratio of at least 50 percent in the top four FCC Form 395 job categories and 50 percent overall when compared to the presence of these groups in the relevant labor force; (c) stations with 50 or more full-time employees—EEO programs will receive in-depth

[3] These are: Officials and Managers, Professionals, Technicians, and Sales Workers.

[4] Comments in support of NAB's rule making petition were filed by American Broadcasting Companies, Inc. ("ABC"), and by the law firm of McKenna, Wilkinson and Kittner, on behalf of its licensee clients ("licensees"). Comments in opposition were filed by the National Black Media Coalition ("NBMC"). As there is an identity of issues raised in the petitions for reconsideration and rule making, the Commission believes that the public interest would be served by considering the comments as bearing on both petitions and, accordingly, determines on its own motion that they will be so considered.

review regardless of employment profile; (d) stations with less than five full-time employees—exempt from filing an EEO program.[5] [6]

6. The processing guidelines are a screening device used by the Commission to determine which of the approximately 3,000 broadcast licensees filing renewal applications each year will have their station EEO programs subjected to in-depth staff-level review.[7] The failure of a station's employment profile to meet those guidelines does not of itself result in any Commission sanction. Rather, the Commission staff inspects the station's EEO program and, where evidence of good faith efforts and/or mitigative circumstances are found, the application is cleared for completion of routine processing. Under the 1977 guidelines, approximately 60 percent of all station EEO programs received such review. Approximately 80 percent of these applications were, upon review, cleared for further renewal processing without imposition of any EEO-related sanctions.[8] [9]

Legal Issues

7. NAB argues that the EEO processing guidelines are substantive in nature. This conclusion appears premised in part on a misunderstanding of Commission processes. For example, NAB alleges that the guidelines "reflect the Commission's view of the 'zone of reasonableness' outside of which some inference arises that a broadcaster is engaged in intentional discrimination or is failing to engage in

[5] The previous guidelines were: (a) stations with five to ten full-time employees—reviewed if no women and/or minorities in top four job categories and/or overall; (b) stations with 11 or more full-time employees—reviewed if ratio not at least 25 percent as to top four categories and 50 percent overall; (c) stations with less than five full-time employees—exempt from EEO program filing requirements.

[6] Our Public Notice, FCC 80-61, announcing the revised processing guidelines erroneously stated that comparisons would be to the station's area "workforce." The term which should have been used is "labor force." The distinction is that the "labor force" includes unemployed individuals. We have in fact traditionally made comparisons on the basis of "labor force" figures. See, in this regard, the release announcing adoption of the previous guidelines. Report No. 14932, March 10, 1977.

[7] In our recently-adopted *Second Further Notice of Proposed Rule Making* in Docket 21474, 45 Fed. Reg. 42729, June 25, 1980, we proposed a number of modifications to our model EEO program, including the physical separation of the model program from the renewal application forms. EEO review of existing licensees would, however, continue to take place within the context of the renewal process.

[8] If an EEO-related petition to deny a renewal application is filed, the application will receive review by the Commission *en banc*.

[9] NAB is well aware of the nature of the EEO review process, for the clearance rate is cited in NAB's own petition, at 14-15, in support of the proposition that broadcasters have generally adopted acceptable affirmative action programs.

affirmative action."[10] [11] This is not the case. If a station's employment profile shows that minorities and women are being employed in a ratio which meets or exceeds the processing guidelines, there is a *prima facie* showing that the station's minority and female employment falls within a "zone of reasonableness." However, a failure to have such an employment profile does not mean that the station's employment is outside a "zone of reasonableness." Whether the station's employment figures fall within a "zone of reasonableness" involves consideration of "all the facts of the case." *Bilingual Bicultural Coalition on Mass Media, Inc.* v. *FCC*, 595 F. 2d 621, at 627, n. 15 (D.C. Cir. 1978) *("Bilingual II")*. A disparity between the percentage of minorities in an area labor force and the presence of minorities in a station's workforce which ". . . is reasonable in light of a recruitment policy might not be reasonable in its absence." *Bilingual II, supra*, at 629, n. 33, citing *Bilingual Bicultural Coalition on Mass Media, Inc.* v. *FCC*, 492 F. 2d 656, 658 (D.C. Cir. 1974) *("Bilingual I")*.[12]

8. Further, we re-emphasize that the guidelines are an administrative device by which the Commission allocates staff resources. A licensee might well have an employment profile which falls within a "zone of reasonableness" but nonetheless evidences inadequate compliance with our EEO program requirements as set forth in Section 73.2080(b) of the Rules. Our in-depth review is not premised on the belief that an employment profile which "fails" the guidelines evidences discrimination, but that such a profile raises sufficient question as to compliance with our rules, and therefore with our ability to determine that renewal would be in the public interest, to suggest that staff time should be expended upon an in-depth review.

9. That this is the manner in which the Commission proceeds was clearly articulated in our response to questions submitted by the Court of Appeals in *Bilingual II*.[13] In that document, we stated as to the processing guidelines:

> We should emphasize that these standards do not set quotas for a licensee but,

[10] NAB pursues this line of reasoning to the conclusion that the Commission may regard the processing guidelines as "quotas defining employment results that broadcasters are now required to achieve." This conclusion is incorrect, and thus we do not address NAB's further conclusions that such quotas would violate the Civil Rights Act, the First and Fourteenth Amendments, and the "no censorship" provisions of Section 326 of the Communications Act.

[11] At the same time, NAB tells us that the staff's clearance of approximately 80 percent of those applications selected for in-depth EEO review without the imposition of any sanctions shows that there is "no evidence of job discrimination" and that most of the reviewed stations "have an adequate affirmative action program in force." NAB petition, at 15.

[12] Of course, "statistical evidence of an extremely low rate of minority employment could constitute a *prima facie* showing of discrimination". *Bilingual I, supra*, at 658, citing *Stone* v. *FCC*, 466 F. 2d at 329–330 (D.C. Cir. 1972).

[13] Letter of FCC Secretary Vincent J. Mullins to George A. Fisher, Clerk, U.S. Court of Appeals for the D.C. Circuit, September 16, 1977, FCC 77–649, at 1–2.

> rather, serve as an important processing tool by which the Commission can be alerted to the need for further review. Thus, where a licensee falls short of the criteria, an in-depth study of its EEO program is undertaken. That study is designed to determine whether a licensee has made and will continue to make reasonable good faith efforts to recruit and employ minorities and women. If it appears that the disparity reflected in the Annual Employment Reports is not the result of an inadequate program, the renewal application can be granted. If our review reveals that the disparity is the result of inadequacies in the program or its effectuation, conditions can be imposed on the grant to remedy that situation.

10. Additionally, we informed the Court that pursuant to the "zone of reasonableness" concept, in cases where allegations of discrimination have been made,

> . . . the Commission examines all the pleadings submitted to it, all available employment reports, the applicant's equal employment opportunity program—with special emphasis on its recruitment and selection efforts, and any other information which may be called to our attention having a bearing on the case.[14]

11. In summary, it is readily apparent that Commission determinations regarding both the "zone of reasonableness" and the renewal of licenses subject to conditions or on a short-term basis due to EEO program deficiencies are made based on our analysis of "numbers plus efforts," and that such decisions are not grounded in numbers alone.

12. NAB also argues that a rule making proceeding is required because "the consequences of a failure to meet the newly announced standards include at very least the subjection of the station involved to close scrutiny of its affirmative action efforts . . . the consequences may well include the imposition of significant reporting or other burdens, not to mention the possibility of sterner action." *Petition for Reconsideration*, at 5. In other words, NAB argues that the processing guidelines are substantive rather than procedural, thus triggering the notice and comment requirements of Section 553 of the Administrative Procedure Act, 5 U.S.C. §553. Stated differently, NAB may be contending that a rule making having a substantial impact on the rights and obligations of parties should not be executed without notice and the opportunity for comment, even if the rule making is exempt from Section 553 of the APA. The NAB arguments must fail. Under either approach, these guidelines are at the very most, only departure points which may or may not lead to further scrutiny of a licensee's EEO program. And, any further scrutiny that is conducted may or may not lead to Commission sanctions. The NAB argument appears to make a quantum jump that the adoption of these guidelines will necessarily produce substantial impact on licensees' conduct, a jump that ignores these significant intervening events. These guidelines are intended only to regulate the Commission's own behavior, should not reasonably

[14] The Court's criticism of our actions in *Bilingual II* was largely premised on its view that the information available to the Commission in conducting these examinations might be inadequate. *Bilingual II*, *supra*, at 635. We have recently taken steps to improve the data regularly available to the Commission and the public. See n. 7, *supra*.

be construed as having substantial impact on broadcast conduct, and are therefore exempt from the notice and comment requirements of Section 553. Our conclusion is consistent with the Court's decision in *Meredith Broadcasting Company* v. *FCC*, 365 F. 2d 912 (D.C. Cir. 1966). In that case, the Commission had issued an interim policy concerning the acquisition of VHF television stations in the top 50 markets, without giving prior notice or the opportunity for comment. The Court noted that the policy in question, announced by public notice in much the same fashion as the guidelines at issue in this proceeding, "simply requires that certain applications will be subject to hearing; and it does not follow that, because the hearing is held, the application will be denied." 365 F. 2d at 914. The Court held that the interim policy was procedural and that prior notice and the opportunity for comment were not required. Similarly, although these guidelines may trigger scrutiny of licensees' EEO programs, it does not follow that the Commission will impose any sanctions. The guidelines still preserve their procedural nature even on those occasions where the Commission does decide to impose sanctions. It is established that "all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." *Ranger* v. *FCC*, 294 F. 2d 240, 244 (D.C. Cir. 1961). See also *Kessler* v. *FCC*, 326 F. 2d 673 (D.C. Cir. 1963) ("freeze order" on acceptance of standard broadcast applications is procedural, even though three classes of applications exempt from freeze); *Pennsylvania* v. *United States*, 361 F.Supp. 208 (M.D. Pa. 1973), *aff'd*, 414 U.S. 1017 (1973) (rule establishing rebuttable presumption regarding propriety of applications for railroad line abandonment is procedural); *Reynolds Metals Co.* v. Rumsfeld, 564 F. 2d 663 (4th Cir. 1977), *cert. denied, sub nom., Reynolds Metals Co.* v. *Brown*, 435 U.S. 995 (1978) (inter-agency memorandum of understanding as to referral of discrimination complaints is procedural); *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), ("administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties," citing *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)).[15]

13. NAB also believes that there are serious questions as to the nature and scope of our jurisdiction to act in the EEO area,[16] a conclusion concurred in by ABC and "licensees." We disagree. Our actions in this area have been subject to repeated judicial review. The Court of Appeals' recent comprehensive opinion on this issue in *Bilingual II* did not conclude that the Commission's authority to

[15] See, also *Noel* v. *Chapman*, 508 F. 2d 1023 (2nd Cir. 1975), *cert. denied*, 423 U.S. 824 (1975); *Shupak* v. *Califano*, 454 F.Supp. 105 (E.D.N.Y. 1978).

[16] NAB has maintained this position with some consistency since 1967. See *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C. 2d 766 (1968), at para. 2.

conduct EEO reviews was in question, or that our reviews were too stringent, but, rather, that on occasion we had not probed deeply enough into licensee employment practices.[17]

14. In *Bilingual II, supra*, at 628, the Court clearly articulated its understanding of Commission jurisdiction as follows:

> In view of the purposes of its regulatory legislation, the FCC analyzes the employment practices of its licensees only "to the extent those practices affect the obligation of the licensee to provide programming that 'fairly reflects the tastes and viewpoints of minority groups,' and to the extent these practices raise questions about the character qualifications of the licensee." (Citing *NOW* v. *FCC*, 555 F. 2d at 1017, quoting *NAACP* v. *FPC*, 425 U.S. 662, 670, n. 7 (1976).

15. Significantly, the Court went on to state, at 628–629:

> . . . in implementing its anti-discrimination policy, the Commission of necessity must investigate broadcasters' past employment practices. A documented pattern of intentional discrimination would put seriously into question a licensee's character qualifications to remain a licensee: intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship.

16. The Court also observed, at 635, that our adoption of the model EEO program and our consideration of revisions to Form 395 in Docket 21474 "are to be highly commended." We do not believe, upon review of the Court's decision in *Bilingual II*, that any serious question exists as to our jurisdiction regarding broadcasters' EEO practices.[18]

Reasonableness of Guidelines

17. NAB, ABC, and "licensees" suggest that the Commission's guidelines, which compare station employment of women and minorities to the presence of those groups in a station's area labor force, may require a licensee to employ women and minorities in the top four job categories at a rate greater than the actual labor force presence of qualified members of such groups. NAB proposes that "workforce availability of minorities and women for the top four job classifications should be used as the standard when measuring broadcaster hiring practices."[19]

18. NBMC states that NAB's position is fallacious because it presumes that to be hired in the top four job categories one must previously have held such a position, or, put another way, "one cannot

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[17] See *Bilingual II, supra*, at 635.

[18] The Court noted that our EEO-related activities had been before it on numerous occasions, citing *Black Broadcasting Coalition of Richmond* v. *FCC*, 556 F. 2d 59 (1977); *NOW* v. *FCC*, 555 F. 2d 1002 (1977); *Alianza Federal de Mercedes* v. *FCC*, 539 F. 2d 732 (1976); *Columbus Broadcasting Coalition* v. *FCC*, 505 F. 2d 320 (1974); *Bilingual I, supra* (1974); and *Stone* v. *FCC*, 466 F. 2d 316 (1972). We observe that the Court has had numerous opportunities to pass upon our jurisdiction in this area, and would undoubtedly have acted on its own motion to limit our EEO-related activities if serious questions existed.

[19] NAB has previously urged this course upon us. See *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C. 2d 226, 232 (1976).

be qualified without prior experience." If this were the case, NBMC argues, upward mobility of Black employees would cease. Further, NBMC suggests, adopting NAB's rationale would result in perpetuating the effects of past discrimination. NBMC argues that the limited number of Blacks presently in top positions is in part due to past discrimination. Therefore, basing standards for new entry on the number of individuals already in such jobs would be "tantamount to permitting discrimination in the past to form the legal basis for discrimination in the future." Comments NBMC, "Taken to its logical extreme, if nobody is in a given category, the zone of reasonableness for future hiring becomes zero."

19. Ten years ago, the Commission determined that it was proper to solicit data on licensee employment even though this would not show the number of qualified individuals available. We observed at that time that the absence of data on the number of qualified Blacks did not affect the legitimacy of our inquiry into employment patterns, unless we were to assume that there were no Black individuals qualified for various positions, ". . . an assumption we are not prepared to make." We noted then, "we have at no time indicated that fully proportional employment of minority groups is called for by our rules, since we do not believe that fair employment practices will necessarily result in the employment of any minority group in direct proportion to its numbers in the community." We observed, however, that ". . . the employment of qualified people may be hindered by indifference as well as overt discrimination," and, in adopting our EEO rules mandating that licensees implement EEO programs, concluded, "The need to prepare a positive program of nondiscrimination should be of benefit from this point of view. It will not lower valid employment standards, as some appear to fear; it will help to insure that qualified people are not overlooked." Such a requirement, we observed, ". . . can be met by all stations, large or small, with reasonable good will." *Petition for Rule Making to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 23 F.C.C. 2d 430, 431–433 (1970). The manner in which we now implement our EEO rules, Section 73.2080 of the Commission's Rules, is consistent with the course we first proposed to take a decade ago.

20. A brief summary of relevant developments since the 1970 Commission adoption of formal EEO rules will help to place the recent revision of our EEO processing guidelines in proper perspective. The Commission first adopted EEO processing guidelines in 1972. These guidelines, applied to stations with ten or more full-time employees, were concerned only with the absence of women or minorities from a station's workforce, or a reduction in female or minority employment below that of the previous year.

21. The conclusion that a licensee's employment of minorities must be within a "zone of reasonableness" lest an inference of discrimination be raised was articulated by the Court of Appeals in the 1972 case

of *Stone* v. *FCC, supra*. In *Stone*, the Court found that a station's Black employment was within a "zone of reasonableness" at 29 percent of parity with the area labor force. In 1974, the Court observed in *Bilingual I, supra*, that ". . . *Stone* represented an initial effort, not a final codification." The Court went on to state, "while we did not endorse the statistical challenge raised in *Stone*, we did not signal satisfaction with the status quo on employment discrimination." *Bilingual I, supra*, at 659.

22. The Commission expanded upon this point in *Mission Central Company*, 54 F.C.C. 2d 581 (1975). We commented in that case:

> The zone of reasonableness is a dynamic concept, which contracts as licensees are given time in which to implement our antidiscrimination rules and policies. Therefore, a percentage of minority employment that once was held to fall within a zone of reasonableness, in light of the licensee's affirmative action program, might not still be contained in a contracted zone of reasonableness as interpreted three years later. 54 F.C.C. 2d at 586.

23. In 1977, the Court stated in *NOW, supra*, that "as EEO plans have additional time to yield results, the Commission can be expected to adopt a more stringent view of the zone . . . ." The Court held in that case that the "zone" inquiry "should surely extend separately to the upper job levels." *NOW, supra*, at 1018–1019. In that year, the Commission adopted revised EEO processing guidelines for renewal applicants providing for an in-depth review of a station's EEO program if minorities and/or women were not employed at 50 percent of labor force parity overall and 25 percent in the top four job categories. Those guidelines applied to stations with more than ten employees. EEO programs of stations with five to ten employees were reviewed in depth if initial screening evidenced exclusion of women and/or minorities from the station workforce. The new guidelines were adopted March 9, 1977, to be effective April 1, 1977. *Report No. 14932*, March 10, 1977.

24. In announcing our adoption of the processing guidelines presently before us, we observed that the 1977 guidelines had been in place for a complete three year renewal cycle. We noted that as of April, 1980, every station covered by the guidelines would have had its EEO performance reviewed under the same standards. Although not addressed in our Public Notice, FCC 80–61, the Commission was cognizant of the fact that overall industry employment in the top four job categories actually equals the 50 percent of parity figure which we established as the guideline with stations employing 11 or more individuals full-time. In 1979, 21 percent of all top four category employees were women and 11.7 percent were minorities, in both cases approximately 50 percent of the presence of these groups in the national labor force. The Commission's change in the processing guidelines applicable to these licensees in effect followed industry trends, and is consistent with prior statements of both the Commission

and the Court of Appeals regarding changes in standards to be expected over time.

25. Licensees with five to ten full-time employees had not previously been reviewed under a numerical guideline. The Commission is aware that small stations are generally locally-owned small businesses which may historically have had no formal methods of recruiting new employees. We also understand that the necessarily lower pay scales of these licensees increase the difficulty of employee retention.

26. At the same time, it is clear that, ten years after our initial action adopting EEO rules and EEO program requirements, progress in the employment profiles of such stations can reasonably be expected. Application of a specific processing guideline is consistent with the spirit of the court-ordered application of the model EEO program to stations with five to ten employees. Our data indicated that the employment profiles of these stations as a group have not advanced as rapidly as the industry as a whole. We therefore determined that it would be appropriate to utilize the 50 percent overall/25 percent "top four" guideline previously applied to larger stations as our initial review standard for this station group. The statistical processing guideline will result in an increased degree of oversight of these stations. We reiterate that it is not a quota, and that an employment profile which does not pass through the guideline screening only triggers a staff-level EEO program review. The lower guideline figure for smaller stations also is the basis of a *prima facie* showing that the smaller licensee's employment of women and minorities is within a "zone of reasonableness." The use of a lower figure in this context recognizes both the unique situation of small stations in hiring and retaining employees and the Commission's cognizance of the limits of statistical tests as applied to the smaller worksite.[20]

27. As we have indicated above, the guidelines are a screening device which allow the Commission to focus its EEO review efforts on those renewal applicants with the least successful EEO performance records. Our final determination as to whether a station's employment profile falls within a "zone of reasonableness" depends on all the facts of a case. A licensee whose EEO program evidences active, meaningful EEO efforts is likely, upon review, to be found to have employment within the "zone," even though the initial statistical screening does not find a *prima facie* showing to that effect.

28. It is our view that the manner in which we conduct our screening is consistent with repeated Commission and judicial determinations regarding the nature and extent of the Commission's EEO-

[20] We note here that the Commission authorized the staff to utilize all of the new guidelines for a three year renewal cycle. Guideline revisions in early 1983 are possible.

related jurisdiction, and that the guidelines recently adopted provide a reasonable basif ror review. Moreover, the labor force-related guidelines utilized by the Commission are far less burdensome to the licensee than the "skills availability" method of analysis which appears to be the type of requirement preferred by NAB. Properly conducted, "skills availability" would require the licensee to analyze the components of every station position, and validate the skills identified as essential to each position. Specific justification of particular hiring decisions would also be necessary.

29. The Commission acknowledges, however, that there are certain highly specialized areas of broadcast industry employment in which few women and minorities have as yet acquired the requisite professional skills. This is the case particularly as to college graduate electronic engineers. The Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority group members have the requisite skills. The licensee should show in its EEO program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply. Evidence of efforts at recruitment should also be presented. The Commission expects that the cases in which such a showing can properly be made will be few.

30. NAB, ABC and "licensees" question our decision to have the staff conduct an in-depth review of the EEO program of all licensees employing 50 or more individuals full-time. As we noted in adopting this instruction, these stations, although only approximately 500 in number, are the work sites of almost half of all broadcast industry employees. We stated in announcing this action that as this group of licensees presently submits job classification data, we would be able to consider in these reviews whether particular jobs are being properly reported in Form 395 job categories. The Commission's intent in authorizing the staff to make such reviews was not, as NAB suggests, the presumption that broadcasters "are providing false data," but, rather, that there may be inadvertent misclassifications which skew aggregate statistics, or that further refinements in the model EEO program and/or Form 395 may be necessary to assist licensees in properly reporting this information. It is legitimately within the province of the Commission to assure the reliability of its statistical reporting devices. For the purposes of making initial determinations as to whether the employment of these licensees falls within a "zone of reasonableness," the same criteria utilized for stations with 11 or more full-time employees applies. Fifty percent of parity in the top four categories and 50 percent in overall employment constitutes a *prima facie* showing that such a licensee's employment is within the "zone."[21]

[21] This *prima facie* showing may, of course, be rebutted by the evidence. Thus, a

Timing of Commission Action

31. Finally, we reach NAB's allegation that the Commission's promulgation of the revised EEO processing guidelines was precipitous and ignored the EEO-related good faith efforts of the broadcasting industry. As we have noted, both the Commission and the Court of Appeals have repeatedly stated that the "zone of reasonableness" can be expected to contract as licensees endeavor to comply with our EEO rules. The industry has advanced in the employment of minorities and women in recent years, although the significance of this increase is not so great as NAB suggests.[22] The new processing guidelines, as we have shown above, reflect industry improvement to this time.

32. The gravamen of NAB's concern as to the timing of our adoption of the new guidelines is "the total lack of notice or lead time before the new guidelines are to take effect." The conclusion implicitly carries within it the "general assumption" stated by ABC that "the processing standards have been mechanistically applied in the past," and that a failure to meet the guidelines in and of itself constitutes a "renewal deficiency." Commission staff statements at our meeting adopting the new guidelines, noting that the only action immediately triggered by a failure to meet the guidelines is closer scrutiny of a station's employment practices, are said by ABC to indicate a "reasonable staff approach" which has not "found expression in any formal agency decision, notice, or policy statement." For those who may have failed to read our previous statements regarding application of the processing guidelines, we trust that this document will serve as ample articulation of our policies.[23]

Conclusion

33. Having fully considered all matters raised by NAB, we find that no basis has been presented for a grant of reconsideration, and similarly, no public interest purpose would be served by the grant of NAB's petition for rule making.

34. Accordingly, IT IS ORDERED, That the Petition for Reconsideration of the Commission's EEO processing guidelines, FCC 80–61, filed by the National Association of Broadcasters, IS DENIED.

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licensee whose employment profile, on numbers alone, makes the *prima facie* showing, could, when all the facts of the case are considered, be determined to be outside the "zone." Conversely, an employment profile which does not present the *prima facie* showing does not mean that the licensee's employment will not be found to be within a "zone" when all the facts are considered.

[22] For example, NBMC suggests that at the present rate of increase, it will take until approximately 2004 for the employment of Blacks to reach parity.

[23] We do not understand NAB's belief that interested parties have, through our adoption of new internal processing guidelines, been placed in the "hapless circumstance" of being unable to apprise the Commission of their concerns and suggestions regarding our EEO policies. The new guidelines do not change substantive Commission rules or policy, and our review of the record of the past 13 years shows that NAB has not been remiss in presenting its views on the matter of Commission EEO policies.

35. IT IS FURTHER ORDERED, That the petition for rule making, RM-3635, filed by the National Association of Broadcasters, IS DENIED.

36. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.[24]

FEDERAL COMMUNICATIONS COMMISSION,*
WILLIAM J. TRICARICO, *Secretary.*

* See attached Statement of Commissioner Abbott Washburn approving in part and dissenting in part.

COMMISSIONER ABBOTT WASHBURN APPROVING IN PART AND DISSENTING IN PART

RE: RECONSIDERATION OF EEO PROCESSING GUIDELINES

My vote today reflects the same concerns which I discussed in my statement when the Commission adopted these guidelines in February. See 45 Fed. Reg. 16335 (1980).

STATEMENT OF COMMISSIONER ABBOTT WASHBURN APPROVING IN PART AND DISSENTING IN PART

RE: RENEWAL AGENDA ITEM #4 – EEO REQUIREMENTS

I am dissenting only to that part of this item which imposes a 50/25 processing standard on licensees with 5 to 10 employees. Along with the other members of the Commission, I am alert to the importance of equal employment and am proud of the FCC's record in this regard. But I believe the imposition of the requirement to employ minority groups and/or women on fulltime staffs at a ratio of 50% of the workforce availability and 25% in the upper four (Form 325) job

[24] On May 30, 1980, NAB filed Reply Comments responding to the comments of NBMC. In its Motion requesting leave to file after the May 28, 1980, deadline for reply comments, NAB argues that the comments are highly pertinent to the issues raised by its petition and NBMC's response. As no prejudice to any party will be caused by acceptance of these comments, and they usefully supplement the record developed thus far, NAB's Motion is granted and the comments are accepted. NAB's reply comments are in part based on the misconception that the failure of a station's employment profile to "meet" the processing guidelines evidences employment outside a "zone of reasonableness." This misconception is fully addressed *supra*, particularly at paras. 6–11. The other major focus of NAB's reply comments deals with "the actual availability of qualified women and minorities." This matter is discussed *supra* at paras. 17–30. NAB notes in its reply comments that fair evaluation of a licensee's efforts should take account of the time period when hiring decisions were made and the nature of the workforce at that time. We concur, observing at the same time that turnover in the broadcasting industry is so substantial that in most cases this factor is of extremely limited relevance. Licensees should also be aware that the Commission will not countenance reliance on historic workforce or labor force data to justify past failure to engage in equal employment practices.

categories is not realistic for such small stations. These stations already have an EEO obligation. To impose stringent additional requirements will prove counterproductive, in my opinion.

I also believe it would have been more judicious and better regulatory practice had the Commission prescribed a date some time in the future for these new processing standards to become effective. This would have allowed licensees appropriate time in which to plan for and to achieve the new EEO goals. Instead, the new standards are becoming effective almost immediately. We were assured by the staff, however, that it will not be looking for immediate compliance.

Hearing, Procedure
License, Assignment Of, Voluntary
Review by Commission

Deferred voluntary assignment applications granted because Commission's procedures were unclear as to whether licensee could sell broadcast stations while in hearing on character issues. Commission adopts new procedure which enables them to decide before the hearing begins whether or not multiple owner can sell non-involved stations while one station is in hearing.

FCC 80-439

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GRAYSON ENTERPRISES, INC. (Assignor) and SOUTHERN MINNESOTA BROADCASTING CO. (Assignee) For Voluntary Assignment of KLBK and KLBK-FM, Lubbock, Texas	File Nos. BAL-780929EA BALH-780929EB

MEMORANDUM OPINION AND ORDER

(Adopted: July 17, 1980; Released: August 7, 1980)

BY THE COMMISSION: COMMISSIONER WASHBURN DISSENTING AND ISSUING A STATEMENT

1. The Commission deferred the applications for voluntary assignment of stations KLBK and KLBK-FM in Lubbock, Texas, from Grayson Enterprises, Inc. (Grayson) to Southern Minnesota Broadcasting Co. (Southern Minnesota). *Grayson Enterprises, Inc.*, 46 RR 2d 1574, 77 FCC 2d (February 26, 1980). Now the Commission has before it Southern Minnesota's Petition for Extraordinary Relief and Reconsideration, filed March 10, 1980.

2. We will set out the history of this case because it is complex. In 1977, Grayson owned four television stations in Texas, KLBK and KLBK-FM, and KCCN in Honolulu, Hawaii. After conducting a field investigation of the television stations, the Commission designated the renewal applications for the television stations for hearing on issues involving Grayson's character (lack of candor/misrepresentation, unauthorized and willful change in main studio location, fraudulent

billing, and program log falsification and/or fabrication). FCC 77–409 (July 7, 1977).

3. On August 8, 1977, before the hearing began, Grayson applied to sell either all of its stations and withdraw from broadcasting completely or just KLBK-TV in Lubbock. The Commission denied the proposal. *Grayson Enterprises, Inc.*, 69 FCC 2d 1924 (1978). The Commission noted that the sale proceeds would be used to satisfy Grayson's debt to Mercantile National Bank at Dallas. Grayson would therefore receive "substantial financial benefits" from the sales. *Id.* at 1829. Because Grayson wanted to sell the stations involved in the hearing, the Commission found the transfers not to be in the public interest. It stated that

> permitting the suspected wrongdoer to evade a sanction by transferring his interest or assigning the license without hearing will diminish the deterrent effect which revocation and renewal proceedings should have on broadcast licensees.

Id. at 1828–29. Finally, although the Commission referred to Grayson's principals as absentee owners, it rejected the argument that they were not involved in any wrongdoing. It stated that "the character issues in this proceeding have not yet been resolved." *Id.* at 1830.

4. On September 28, 1978, Grayson applied to sell KLBK and KLBK-FM to Southern Minnesota, a qualified assignee, for $1,750,000. The Commission noted that the proceeds would again benefit Grayson by reducing its debt to the bank. It concluded that, because of such "substantial and unwarranted benefits", the transfers were not in the public interest. 46 RR 2d at 1576, quoting 69 FCC 2d at 1829.[1] Relying on its *Policy Statement on Qualifications of Broadcast Licensees*, 28 RR 2d 705 (1973), the Commission deferred the applications pending a resolution of the issues designated with respect to Grayson's television stations.[2]

5. On March 27, 1980, the Commission approved Grayson's request

[1] The Commission distinguished *Sonderling Broadcasting Co.*, 46 RR 2d 889 (1979), in which it permitted the sale of stations not involved in the alleged wrongdoing. In *Sonderling* the Commission did not have any evidence that the principals were involved and, in fact, the evidence indicated that only lack of control was involved.

[2] The *Policy Statement* provides that:

> Action on applications to . . . acquire . . . existing facilities will generally be deferred where:
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> • • • • • • •
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> B. With respect to a prospective seller or an individual who has a controlling interest in the seller there is:
>
> (1) A pending renewal, revocation or investigation proceeding involving the particular station which is sought to be sold.

It continues that, in "all other situations", the Commission will "take into consideration other compelling public interest factors." It concludes that:

> Where we find that the public interest would be served by granting the

to sell all four television stations by distress sale. FCC 80–175, FCC 2d 156 (April 10, 1980). This terminated the hearing and left the character issues unresolved.[3] In allowing the distress sale of the television stations, the Commission declined to reach an issue of Grayson's truthfulness in the prosecution of the distress sale applications "in large part because Grayson is intending to sell all of its broadcasting properties."[4] However, the Commission reserved the right to examine that issue in any future Grayson proceeding.

6. The Commission now faces the decision whether to permit the sale of KLBK and KLBK-FM or designate those applications for hearing on the issues raised with respect to the television stations. Southern Minnesota cites three cases in its Petition for Reconsideration that it claims require a grant here. We do not find them dispositive. In both *Walton Communications, Inc.* (an unreported assignment granted on delegated authority, September 19, 1977) and *Sonderling, supra*, the issues in the hearing on the assignor's qualifications involved lack of control, not misrepresentations by the principals. In *KFPW Broadcasting Co.*, 47 FCC 2d 1090 (1974), the Commission granted a licensee a construction permit despite denying on character grounds his application to renew a second station. However, the Commission subsequently granted reconsideration and renewed the license for the second station. *George T. Hernreich*, 72 FCC 2d 511 (1979). *KFPW* is therefore not authority for approval of the assignment here.

7. The Communications Act bars a broadcast license assignment unless the Commission finds it in the public interest. 47 U.S.C. §310(d). It is axiomatic that the fundamental element of the public interest is prospective broadcasting service. *See, e.g.*, 46 RR 2d at 1575. Of course, the licensee selling a station will not be operating it in the future, so the prospective conduct at issue is that of other licensees or, if the seller is a multiple owner, its conduct of other stations. Permitting a licensee with a station in hearing on character issues to sell another station may encourage or otherwise reflect a tolerance of wrongdoing. We certainly do not want to do anything that would appear to condone wrongdoing. On the other hand, our present *Policy Statement* now focuses primarily on prohibiting the sale of the station in hearing

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application, such a grant will be made subject to the outcome of the pending proceeding. If such a finding cannot be made, then action on the application will be [deferred].

[3] All the distress sales have not yet been consummated. Any distress sales that are not consummated will result in the case(s) being returned to active hearing status.

[4] On December 15, 1979, Grayson filed with the Commission a contract to sell KCCN. It has represented that it will apply to assign that license if the Commission grants the applications to assign KLBK and KLBK-FM.

(except in certain circumstances like distress sale to a minority); sales of uninvolved stations are permitted under certain circumstances.[5] It may also be that the possible loss of a single station may provide sufficient deterrence to other licensees.

8. There are other factors we must consider as well. Deferral of an assignment application can have an adverse impact on the community in which the station is located. By filing an assignment application, the broadcaster has announced to its employees and the public that it no longer wants to operate the station. A deferral of that assignment application—especially for periods of almost two years, as the case here—may result in a deterioration of service to the community. The licensee will probably be reluctant to invest any new resources or effort in improving service after it has negotiated a deal with the buyer. The performance of employees at the station to be sold may also be impaired if they are asked to work for a considerable time under an employer who has announced its intention to leave the station; employees may justifiably feel that the licensee is no longer interested in maintaining good service or in rewarding employees who excel in their jobs.

9. In reviewing assignment applications like Grayson's, then, the Commission must balance its general long-term interest in deterrence with the immediate interest in assuring good broadcast service to the particular community involved. In the past, we have tried to balance these competing interests on an *ad hoc* basis as the cases arise. Upon further examination, we think this *ad hoc* approach only compounds the problems. This approach creates a great deal of uncertainty for everyone—the broadcaster involved, the prospective buyer, the employees, the public, and even the Commission itself. Until an assignment is negotiated and the application is filed, there is little basis for knowing whether it will be granted. The answer can only be determined after the Commission and the parties have expended considerable resources and the community put under the risk of deteriorated service. Moreover, in reaching its conclusion, the Commission must usually act without the advice of the Broadcast Bureau. As a party to the hearing case, the Bureau is foreclosed by *ex parte* rules from discussing the merits of the hearing case with the Commission (and often an evaluation of the allegations involved in the hearing is relevant to whether the Commission should approve the assignment). This cuts the Commission off from a valuable source of information and expertise. The Bureau staff prepared the investigative report and is most familiar with the particulars of the evidence acquired.[6]

[5] The 1973 *Policy Statement*, *supra*, 28 RR 2d at 706, states that the Commission may approve the transfer of stations not in hearing after considering "the nature of the questions raised" and "other compelling public interest factors."

[6] It should be noted that the Bureau's investigative report generally provides the only information concerning the broadcaster's misconduct. This is because assignment

10. Because of these problems, we have decided to adopt a new procedure for handling these matters. Henceforth, if the Commission designates a license application of a multiple owner for hearing, the Commission will simultaneously decide whether that applicant can sell other stations.[7] In making that decision the Commission will apply the same standards it has applied in the past. While there are no hard and fast rules on these character questions, the basic issue will be whether there is a substantial likelihood that the allegations warranting designation of one station for hearing bear upon the operation of other stations. If, after considering all the particular facts and circumstances, the Commission concludes that there is a substantial likelihood that the allegations bear upon the operation of other stations, it will take appropriate action to advise the broadcaster that assignment applications for other stations will not be entertained.[8] If the Commission does not in some way express any limit on a multiple owner's right to sell its other stations, the broadcaster will be free to assign them (subject, of course, to normal processing standards concerning legal, financial, technical and other matters). If the Commission does not impose any limitations on the right to sell at the time of designation, however, the Commission will still retain the discretion to impose such limitations or take appropriate action against the broadcaster's other stations at a later point if the circumstances warrant, i.e. if the hearing record ultimately discloses that the misconduct was more serious than initially believed. Conversely, the Commission may later remove any limitations on selling if the hearing record dispels the Commission's concerns or if new facts and circumstances demonstrate that allowing a sale would serve the public interest. Finally, we take this opportunity to clarify the consequences of any distress sale of a station designated for hearing. *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978). If the Commission does not impose limitations on the owner's right to sell other stations,stations, a distress sale will mean a complete termination of any inquiry into the allegations designated for hearing. This is because a failure to impose selling limitations will signify that the allegations do not bear on the operation of other stations.[9] This will take effect prospectively. For multiple owners who

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applications are often presented before the hearing has been completed. For example, like many other broadcasters whose applications were designated for hearing, Grayson elected to sell its television stations under the distress sale policy rather than go through a hearing.

[7] The 1978 *Policy Statement* already provides that a broadcaster in hearing on "basic character qualifications" cannot acquire other stations.

[8] There are many options available to the Commission to express this limitation. As examples, the Commission could (1) include a statement to that effect in the designation order, (2) condition the renewal of the broadcaster's other stations, or (3) designate the other stations for hearing.

[9] Of course, the Commission retains the discretion to review those hearing allegations in light of any new facts or circumstances that come to the Commission's attention

presently have one or more stations in hearing, the Commission will make a determination, based on the particular facts and circumstances of the situation, as to whether consummation of a distress sale will terminate further inquiry into the matters designated for hearing in connection with any station the applicant proposes to acquire or continue to operate.

11. This new procedure should produce greater certainty for all concerned and, as a result, greater protection of the public interest. At the same time, the new procedure will not disturb the deterrent effect of present substantive policies since they remain intact. And if experience should prove that the new procedure causes unanticipated problems, we of course remain free to make appropriate changes.

12. We now turn to the KLBK assignment applications. We will grant these applications. The uncertainty of our present procedures created a situation in which Grayson may have had a reasonable basis for believing that it could sell the radio stations; this is especially so since the Commission did not condition the renewal of the radio station licenses or in any other way express to Grayson that it could not assign those licenses. For the same reasons, we can allow the processing of any application to sell Grayson's Hawaii radio station. If any of these proposed sales is not consummated, however, we will designate the license renewal application(s) for hearing to resolve the character issues raised with respect to the television stations.

13. We also want to take this opportunity to instruct the Broadcast Bureau to act on other pending assignment applications where the assignor, like Grayson, has another station in hearing and the Commission has not conditioned the renewal of the station to be sold or otherwise expressed a limitation on the broadcaster's right to sell its other stations. We must also issue instructions to handle future assignment applications by broadcasters who now have stations in hearing. Unless and until the Commission does express some limitation on the right of those broadcasters to sell their other stations, the broadcasters are free to file assignment applications, which will be disposed of under normal processing standards concerning legal, technical and other qualifications.

14. Accordingly, IT IS ORDERED that (a) the Petition for Extraordinary Relief and Reconsideration filed March 10, 1980 by Southern Minnesota Broadcasting Co. IS GRANTED, and (b) the applications for voluntary assignment of KLBK and KLBK-FM filed

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after designation, i.e. through pre-hearing discovery or a petition to deny against an uninvolved station, and, as a result, to designate the renewal licenses of the so-called uninvolved stations for hearing.

September 28, 1978 by Grayson Enterprises, Inc. and Southern Minnesota Broadcasting Co. ARE GRANTED.[10]

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ABBOTT WASHBURN IN WHICH COMMISSIONERS QUELLO AND JONES JOIN

RE: ASSIGNMENT AND TRANSFER APPLICATIONS INVOLVING STATIONS HELD BY LICENSEES WITH OTHER STATIONS IN HEARING

I would have granted the assignment application of stations KLBK and KLBK-FM but not for the reasons stated in the item and not with the excess baggage of the new policy. Little, in my judgment, would be gained by deciding the transferability of stations owned by a licensee as soon as one of the licensee's other stations has been designated for hearing. Indeed, it would put the Commission in a less flexible position.

First, making the decision at the very outset would be a useless expenditure of Commission time and resources unless we had a transfer application before us—i.e., it is quite possible the owner would never apply to sell during the hearing. In this regard the Commission would be better advised to follow the practice of the courts, which would refuse to resolve an issue (e.g., transferability of the other stations) unless an application was squarely before them.

Second, issues designated originally (and relied upon by the Commission to defer or designate additional stations) might be deleted by the presiding Administrative Law Judge. Holding all of the multiple owner's licenses hostage to possible weaknesses in the Commission's case is unjust. We were assured during the discussion that language is being added to the final document which will clearly state that a decision to disallow the transfer of all stations at the time of designation one or more licenses of a multiple owner *may be revisited by the Commission upon request of the licensee.* Again, there might not be a need for the Commission to *re* decide if the Commission waited to make its initial decision until an application was actually filed by the licensee.

Third, issues designated for hearing are allegations only. We do not designate with the certainty that all will be proven; we do so only with the conviction that the untested information collected by our staff raises substantial and material questions. Witnesses may not be as cooperative in a hearing room as they were in the privacy of an interview; evidence relied on may not be admissible; mitigating and character evidence may be introduced which puts a different light on our consideration of the licensee in the circumstances of the case.

Finally, little will be gained by deciding the transferability of

[10] Effective May 14, 1980 the call letters of KLBK were changed to KSAX.

stations owned by a licensee as one of its other stations is being designated even if the designated station is ultimately sold under our distress sale policy. Character issues do not arise from a vacuum but rather spring from evidence of bad conduct, i.e., actual misdeeds. If the evidence is that misdeeds are absent from all but the designated station and it is sold, we then know that the issues concerning the *involved* station will *never* be resolved. The question then becomes whether or not to litigate the character issues by designating the other stations which, as far as we know, are uninvolved in the misdeeds. Both practically and legally, a distress sale puts an entirely different light on the question.[1]

In summary, the Commission would be in a better posture by waiting to address the question if and when it actually arises in an application for transfer. The ultimate decision is a judgment call by the Commissioners. This call can be assisted only so far by facts and recommendations provided by the Broadcast Bureau. If the opinion of the Broadcast Bureau is desired at any point during the hearing process, it can be requested and the *ex parte* problems cured by giving opportunity to the licensee to respond. A hard and fast policy to make the judgment call at the very outset of designation is unfair, unnecessary, and leaves the Commission in a less flexible position to deal effectively with the specific situations in each case.

Accordingly, I dissent.

[1] I agree with Commissioner Joncs' observation that since part of the rationale of the distress sale policy is to save Commission resources by avoiding the expense and time of a hearing, designating the same character issues against other uninvolved stations calls into question the wisdom of granting the application for distress sale.

Authority Delegated, Action On
Political Candidate, Purchase Of Time
Political Candidate, State Or Local Office

Commission staff, through delegated authority, finds no violation by broadcaster for refusal to sell specific class of time to non-federal candidate during 45-day period before primary. Broadcaster's actions were in accordance with Commission's rules and Communications Act.

Delegated Authority
00004

BEFORE TH

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by

State Senator William H. Hernstadt against Station KTNV-TV, Las Vegas, Nevada Concerning Political Broadcast

August 29, 1980

Honorable William H. Hernstadt
c/o Law Office of Gordon & Healy
1821 Jefferson Place, N.W.
Washington, D.C. 20036

Dear Senator Hernstadt:

This is in reference to your complaint against Alfa Broadcasting Company ("Alfa"), the licensee of station KTNV-TV, Las Vegas, Nevada, filed with the Commission on your behalf by counsel on August 15, 1980.

You represent that you are "an incumbent State Senator in Nevada, and [are] currently a legally qualified candidate for reelection in the state primary" to be held on September 9, 1980. You state that you sought to purchase run of schedule (ROS) spots through your representative, Joyce and Martin Advertising, Inc. Specifically, you "requested that ROS spots be made available on the same basis as to commercial advertisers." KTNV-TV refused to sell you ROS spots as requested, and instead offered you fixed position spots.[1] Citing *Triangle Publications, Inc.*, 23 FCC 2d 760 (1967), you contend that

[1] You state that you purchased one fixed spot from KTNV-TV at a cost of $60. You also state that the ROS spots available to the station's commercial advertisers cost

KTNV-TV's refusal violates Section 315(b) of the Communications Act and Section 73.1940(b)(1) and (2) of the Commission's Rules.[2] Joyce and Mertin Advertising, Inc. filed a similar complaint with the Commission against KTNV-TV.

On August 21, 1980, Alfa responded through counsel. Alfa does not dispute the facts as set forth in the complaint. Alfa argues, however, that a station "has the right to decline to offer certain classes of advertising time to nonfederal candidates," while making other classes of time available to them.

You characterize ROS spots as the "lowest unit rates" or "discount privileges" offered by the station; Alfa refers to the spots as a "class of time." The Commission has defined ROS spots both as a "discount privilege"[3] and a "class of time."[4] The issue presented in this case, however, is whether a licensee violates Section 315 and Section 73.1940(b)(1) by declining to sell a nonfederal candidate a specific class of time 45 days before a parimary? For the reasons discussed below, we believe that Alfa's actions were in accordance with 1971 amendments to the Communications Act and the Commission's rules and regulations.

Prior to the enactment of Title 1 of the Federal Elections Campaign Act of 1971 ("FECA"), Section 315(b) read as follows:

> The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

The corresponding Commission rule section 73.120(c)(1), provided, in pertinent part, that:

> All discount privileges otherwise offered by a station to commercial advertisers shall be available upon equal terms to all candidates for public office.

In *Triangle Publications, Inc., supra*, the Commission had occasion to interpret and apply the "comparable use" and "discount privilege" language. The Commission ruled that Section 315(a) and Section

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approximately $20 per spot. Thus, you claim that you are "merely seek[ing] the lowest unit rates (ROS) which are offered to commercial advertisers . . . ."

[2] You also allege that Alfa violated Section 73.1940(d) by failing to maintain a complete political file. Alfa states that: 1) the political file consists of political agreement forms which contain all the information that is required by law; and 2) the contracts for political advertisements, which you actually sought to inspect, are kept elsewhere. Your counsel, Mr. Larry A. Miller, advised a staff attorney during their phone conversation of August 22, 1980, that you concur with Alfa's representations. As Section 73.1940(d) does not specifically require that political advertising contracts be contained in the political file, Alfa did not violate the Commission's rule by keeping them elsewhere.

[3] See *WGN Continental Broadcasting Co.*, 58 FCC 2d 1142, 1145 (1976); *Triangle Publications, Inc., supra*.

[4] See *Holden E. Saunders*, 52 FCC 2d 592 (1975); *see also The Law of Political Broadcasting and Cablecasting (Political Primer)* 69 FCC 2d 2209, 2275 (1978); *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510 (VI Q. & A. 1) (1972).

73.120(c)(1) compel a licensee to sell political candidates ROS spots on the same basis as that offered to commercial advertisers.[5]

The enactment of Title 1 of the FECA amended Section 315(b) to include the "lowest unit charge" provision, which now reads as follows:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed–
>
> (1) during the *45 days preceding the date of a primary* or primary runoff election and during the 60 days preceding the date of general or special election in which such person is a candidate, the *lowest unit charge* of the station for the *same class* and *amount of time for the same period;* and
>
> (2) *at any other time, the charges made for comparable use* of such station by other users thereof. (Emphasis added.)

The amendment to Section 315(b) is reflected accordingly in Section 73.1940(b)(1) and (2). Subparagraph (1) relates to the lowest unit charge provision; subparagraph (2) relates to the comparable use provision and contains the same language concerning "discount privileges" that appeared in Section 73.120(c)(1).

In *Use of Broadcast and Cablecasting Facilities by Candidates for Public Office*, 34 FCC 2d 510 (1972), the Commission explained what is meant by "the lowest unit charge of the station for the same class and amount of time for the same period," as follows:

> The term "class" refers to rate categories such as fixed-position spots, preemptible spots, run-of-schedule and special-rate packages. The term "amount of time" refers to the unit of time purchased, such as 30 seconds, 60 seconds, 5 minutes or 1 hour. The term "same period" refers to the period of the broadcast day such as prime time, drive time, class A, class B or other classifications established by the station.
>
> Candidates are entitled to discounts, frequency and otherwise offered to the most favored commercial advertiser for the same class and amount of time for the same period, without regard to the frequency of use by the candidate. This includes discount rates not published in a rate card but provided to commercial advertisers. *Id.* at VI Q. & A. 1.

Regarding the "comparable use" provision, the Commission stated:

> *The term is identical with that in Section 315(b) prior to its amendment by the Campaign Communications Reform Act, and is construed in the same manner.* The section entitled "VIII. What rates may be charged candidates for programs under Section 315?" in the 1970 primer contains Commission rulings on this statutory term and on paragraph (c)(b) of the Commission rules governing political broadcasts and cablecasts which implemented the old Section 315(b). These rulings are still valid. *Id.* at VI Q. & A. 25. (Emphasis added.)

The prior rulings, referred to above, included *Triangle Publications, Inc., supra*. See *Use of Broadcasting Facilities by Candidates for Public*

[5] See also *WGN Continental Broadcasting Co., supra* at 1145 ("prior to the enactment of the FECA, the Commission recognized that candidates should be given the opportunity to purchase low-cost spots made available to commercial advertisers," *e.g.*, ROS and preemptible spots).

Office, 24 FCC 2d 832 (VIII Q. & A. 16.) (1970). Further, *Triangle Publications, Inc., supra*, is cited in the "comparable use" section of the *Political Primer, supra*.

In *Anthony Martin-Trigona*, 64 FCC 2d 1087 (1977), the Commission had occasion to review past rulings regarding "lowest unit charge." Whereas *Martin-Trigona* dealt specifically with a nonfederal candidate's request for program time rather than ROS spots, we believe that the Commission's decision is dispositive of the instant complaint. Citing *Licensee Responsibility under Amendments to the Communications Act by the Federal Election Campaign Act of 1971*,[6] and *WGN Continental Broadcasting Company*,[7] the Commission stated:

> These decisions were grounded, in part, upon the belief that Section 315(b) required not only that candidates be placed on par with the broadcaster's most favored commercial advertiser in the rates to be charged for political ads, but extended also to tye type [class] of service available. . . .
>
> We find that to the extent that those decisions rested on the concept of parity between political and commercial advertisers, that parity applies solely to the price of a particular type and length of time, but does not provide a right of access to all types available to other advertisers.[8]

Anthony Martin-Trigona, supra, effectively overruled prior Commission rulings to the extent that they required stations to sell nonfederal candidates every class and amount of time as that made available to commercial advertisers.

The decision in *Anthony Martin-Trigona*, however, did not address nor affect *Triangle Publications, Inc., supra*, as it relates to the "comparable use period," outside the 45/60 day limit.

A clear reading of Sections 315(b)(1) and (2), the corresponding rules and regulations and the Commission's interpretations thereof, indicates that during periods outside the 45/60 day limit, all candidates may rely upon *Triangle Publications Inc.*, and seek the "discount privileges" (e.g., ROS spots) offered by the station; whereas, during the 45/60 day period, the candidates may avail themselves of the station's "lowest unit charge." The nonfederal candidate, however, is not entitled to every class, amount and period of time available to commercial advertisers.[9] Although the Commission generally expects stations to devote time to the campaigns of state and local candidates in proportion to the significance of the races and the amount of public

[6] 47 FCC 2d 516 (1974) (station must put candidates in the "same position" as the most favored commercial advertisers by making available announcements of the same class and amount of time as that sold to commercial advertisers.)

[7] 58 FCC 2d 1142, 1144 (1976) (if a station sells spots to commercial advertisers, it cannot restrict a candidate to five-minute program time.)

[8] See also *Warren Moity, Sr.*, 46 RR 2d 399, 400 (1979) (there is no requirement that candidates be offered the least expensive class of time, only that they receive the lowest unit charge for the same class and amount of time for the same period.)

[9] *See Anthony Martin-Trigona*, 64 FCC 1087 (1977); *Warren Moity, Sr.*, 46 RR 2d 399 (1979), *supra*.

interest in them, the law does not create an affirmative right of access in candidates for nonfederal office.[10]

Based on all of the foregoing, Alfa's refusal to sell you a specific class of time (ROS spots) during the 45-day period prior to the primary did not violate Section 315(b)(1) of the Communications Act or Section 73.1940(b)(1) of the Commission's Rules and Regulations.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within 30 days of the release date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Code of Federal Regulations, Volume 47, Section 1.115.

SINCERELY,

STEPHEN F. SEWELL, ACTING CHIEF,
COMPLAINTS AND COMPLIANCE DIVISION,
BROADCAST BUREAU.

cc: KTNV-TV
Counsel

[10] *See Warren Moity Sr., supra* at 400 (1979); *Anthony Martin-Trigona, supra* at 1089 (1977); *James H. Doyle*, 38 RR 2d 330, 323 (1976); *Dan Walker*, 57 FCC 2d 799 (1975); *see also Political Primer, supra* at 2286.

Construction Permit Modification Of
Interference, FM Station
Petition To Deny

Application for construction permit to change FM Station transmitter location granted and petition to deny denied. Commission finds this modification will neither increase interference to nearby FM station nor change class status of permittee.

FCC 80-429

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SANTA MONICA BROADCASTING, INC. Santa Monica, California For a Construction Permit for Modification of Facilities of KSRF-FM, Santa Monica, California	File No. BPH-790130AC

MEMORANDUM OPINION AND ORDER

(Adopted: July 17, 1980; Released: August 18, 1980)

BY THE COMMISSION:

1 The Commission has before it for consideration: (1) the above-captioned application for modification of KSRF-FM's (KSRF) existing facilities; (2) a petition to deny the application, timely filed, May 30, 1979 by Hutton Broadcasting, Inc., the licensee of KOCM-FM, (KOCM), Newport Beach, California; (3) KSRF's opposition to the petition to deny and accompanying amendment to its application filed on October 12, 1979; (4) KOCM's reply filed November 5, 1979; and (5) KSRF's response, filed November 16, 1979.

2. KSRF has applied for a construction permit to change its transmitter location with an accompanying decrease in its effective radiated power and increase in antenna height above average terrain. The move would also involve a decrease in the existing short-spacing between KSRF and co-channel station KOCM by 2.5 miles.[1] The

[1] Both KSRF and KOCM operate on Channel 276A (103.1 MHz) under Section 73.213 of the Commission's Rules which permits short-spacing under certain conditions for stations that were not in compliance with the basic short-spacing requirements of Section 73.207 as of November 16, 1964. The existing distance of KSRF's facilities from KOCM's transmitter is 41.5 miles, while KSRF's proposal would increase that distance to 44 miles. KSRF's initial proposal of 0.562 kW (H&V) and HAAT of 575.5 feet (H&V) and its amended proposal of 0.87 kW (H&V) and HAAT of 570 feet

applicant stated that the primary reason behind its proposal was the deterioration of its signal to the city of license, Santa Monica, caused by interference from high-rise construction in the city. To increase the quality of the signal from its present low-lying site, minus 95 feet in height above average terrain, KSRF proposes to move its transmitter to a hilltop overlooking Santa Monica Bay.

3. KOCM's petition to deny alleges that KSRF's proposal would result in ruinous interference to KOCM's co-channel signal. The petitioner advances two main arguments. First, KOCM contends that the KSRF modification would cause interference within its claimed legally protected 1 mV/m contour, an area which the petitioner claims was previously interference-free. KOCM's second contention is that the modification would alter KSRF's status as a small class A station primarily serving Santa Monica.

4. In its opposition, KSRF disputes KOCM's claim of increased interference by showing that the proposed modification will result in virtually the same amounts of interference within KOCM's 1 mV/m contour as exists now. Moreover, KSRF argues that since its proposal is within the requirements of Section 73.213, the factor of interference within another co-channel station's 1 mV/m contour is irrelevant. In addition, KSRF denied that its proposal would result in any de facto channel allocation from Santa Monica.

5. Replying to KSRF's opposition to its petition to deny, KOCM suggested that KSRF construct its new transmitter in the alternative area of Baldwin Hills in order to eliminate any objectionable interference. KSRF responded to this suggestion by claiming that the alternative site idea violated Section 1.45(b) of the Commission's Rules, in that it raised a new matter that was not in direct response to any matter contained in KSRF's opposition.

6. *Interference issue.* The main determinative factor regarding KOCM's allegation of destructive interference involves predicting where KSRF's 0.1 mV/m contour will extend after any modification compared to its present 0.1 mV/m contour vis-a-vis KOCM's service area. KOCM claims that while KSRF's present 0.1 mV/m contour does not overlap KOCM's 1.0 mV/m contour, the modification will shift the KSRF 0.1 mV/m contour approximately 20 miles southeastward with the effect of overlapping almost all of KOCM's 1.0 mV/m contour. KSRF sharply disagrees, claiming that while its 0.1 mV/m contour currently reaches into over one-half of KOCM's 1.0 mV/m service area, the modification of transmitting facilities will result in almost identical interference. After determining KSRF's present and proposed contours according to the methods in Section 73.313 of our Rules,

(H&V) at the proposed transmitting site are in compliance with Section 73.213. Thus, while KSRF's new site would be short-spaced, the proposal is acceptable under the Commission's Rules for filing.

we agree with KSRF's predictions.[2] We conclude that KOCM has erred in its engineering analysis by substantially underestimating the degree of present interference and overestimating the degree of proposed interference. Moreover, we are unable to determine the reasons for KOCM's miscalculations. Therefore, we find that the proposal will cause no additional interference to KOCM's 1.0 mV/m area.

7. Regardless of whether the modification of KSRF's facilities will result in any overlap of KOCM's 1 mV/m contour, compliance with Section 73.213 usually controls the issue of impermissible interference. Since 1962, the nature and extent of interference protection accorded commercial FM broadcast stations has been determined solely by the mileage separation, power and antenna height limitations set forth in our rules without regard to the concept of protected and interfering contours previously employed. *First Report and Order in Docket No. 14185*, 33 FCC 309 (1962); Section 73.209(b) of our Rules. In that proceeding, the Commission determined that minimum mileage separation standards offer the best means for achieving an orderly, efficient and effective development of the commercial FM broadcast service. The Commission, however, left open the question of whether a station can object on contour-interfering grounds in *Revision of FM Rules, Fourth Report and Order*, 3 RR 2d 1571 (1964), by stating that the interference issue would be examined on a case-by-case basis in future situations of short-spaced stations under Section 73.213. In discussing such a situation in *Marvin Broadcasting Company, Inc.*, 1 FCC 2d 759, 6 RR 2d 127 (1965), the Commission emphasized the importance of any additional area which would receive interference as a factor in determining whether the station's 1 mV/m contour is legally protectable. Since KSRF's proposal will involve no additional area of interference within KOCM's 1 mV/m contour, KSRF's compliance with Section 73.213 mandates that KOCM's objection on contour-interference grounds is inapplicable.

8. *Service area issue.* KOCM questions whether KSRF will continue to primarily serve its city of license, Santa Monica, as a result of its proposed greater coverage of Los Angeles. While KSRF's 1 mV/m contour presently encompasses a significant section of the "Westside" area of Los Angeles, the modification will extend the contour to cover almost all of the Los Angeles city limits. KOCM does not claim a de facto reallocation of channel 276A from Santa Monica to Los Angeles, but instead charges that, as a result of the modification, KSRF will no longer be a class A FM station, which Section

[2] The Commission's staff utilized Section 73.313(a), (b), (c) and (d) of our Rules in reaching this conclusion. KSRF's existing 0.1 mV/m contour (at an azimuth of 130° true, ERP of 1.85 kW and an antenna radiation center above average terrain of 362 feet) extends a distance of 44 miles from KSRF's existing site, or 2.2 miles southeast (i.e. on the far side) of KOCM's transmitter site. KSRF's proposed 0.1 mV/m contour, on the other hand (at an azimuth of 135° true, ERP of 0.35 kW and antenna radiation center above average terrain of 1037 feet) extends only 45.5 miles from KSRF's proposed site, or 1.8 miles southeast of KOCM's site.

73.206(a)(2) defines as a station "designed to render service to a relatively small community, city, or town, and the surrounding rural area." Since KSRF's proposed facilities are in compliance with Section 73.213's limits regarding a class A FM station's power and antenna height limitations, we find KOCM's allegation to be of no consequence.

9. *Alternative transmitter site issue.* KOCM's attempt to raise an additional issue in its reply to KSRF's opposition regarding an alternative transmitting site in Baldwin Hills should not be permitted for three reasons. First, in addition to KSRF's claim that the alternate proposal raises a serious question as to whether coverage of Santa Monica by KSRF with the required 3.16 mV/m signal would be possible from the Baldwin Hills site, KOCM has not shown that KSRF's overall service area would be substantially the same with the alternate site. *John Poole Broadcasting Co.*, 9 RR 1018 (1953). Second, KOCM has not requested a waiver of Section 1.45 which requires that a reply to an opposition "shall be limited to matters raised in the oppositions . . . ." KOCM did not at all discuss such an alternative transmitting site in its petition to deny nor did KSRF discuss such an issue in its opposition. Therefore, the question of an alternative transmitter site need not be considered. Third, we will not consider a petitioner's hypothetical alternative proposals where an applicant's proposal is in compliance with the Commission's Rules and otherwise in the public interest. *WKYR, Inc.*, 1 RR 2d 314, affirmed sub nom. *Allegany County Broadcasting Corporation v. FCC*, 348 F. 2d 788 (D.C. Cir. 1965).

10. Accordingly, IT IS ORDERED, That the petition to deny filed by Hutton Broadcasting, Inc., licensee of KOCM-FM, Newport Beach, California, IS DENIED.

11. IT IS FURTHER ORDERED, That the application of Santa Monica Broadcasting, Inc., licensee of KSRF-FM, Santa Monica, California, to modify its facilities IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

Common Carrier, Data Processing Service
Computer Networks
Tariff, Regulation Of

Motions for Partial Stay of Second Computer Inquiry Decision (77 FCC 2d 384) granted in part. Order establishes transition period for common carriers to detariff existing enhanced services. Motion for stay of portion of decision which found enhanced services not subject to Title II regulation, and motion to defer effective date of that period of decision denied. 20828

FCC 80-425

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)	Docket No. 20828

MEMORANDUM OPINION AND ORDER

(Adopted: July 17, 1980; Released: July 22, 1980)

BY THE COMMISSION: COMMISSIONER FOGARTY CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JONES CONCURRING IN THE RESULT.

1. Presently before us are two requests for partial stay of the *Final Decision* in this proceeding (FCC 80-189, released May 2, 1980).[1] Motions for stay were filed on June 6, 1980, on behalf of Tymnet, Inc. ("Tymnet") and GTE Telenet Communications Corporation ("Telenet"). Tymnet requests that thatportion of the decision which deregulates existing "enhanced" services be stayed for at least six months following disposition of petitions for reconsideration so as to afford it reasonable time to convert its relationships with its customers from a tariff to a contractual basis. Likewise, Telenet seeks a stay of similar duration of that portion of our *Final Deicsion* which holds that enhanced services do not constitute communications common carriage subject to Title II of the Act. In the alternative, Telenet asks that the

[1] The *Final Decision*, published in the Federal Register on May 13, 1980, 45 F.R. 31319, was to become effective on June 13, 1980. The Chief, Common Carrier Bureau, on June 12, 1980, issued an order Mimeo No. 32542, deferring the effective date of the Final Decision until July 18, 1980, to allow for the filing of pleadings in opposition to the motions for stay, and to allow the Commission time to assess the merits of the stay requests.

Commission defer, as a matter of policy the effective date of this portion of the Final Decision.

2. Both Tymnet and Telenet express uncertainty as to the basic or enhanced nature of some of their currently tariffed services and assert that clarification of the basic/enhanced definitional structure is necessary. Petitioners state that a reasonable period of time is needed to avoid substantial disruption in changing their tariff-based customer relationships to contractual relationships for their enhanced service offerings and to negotiate individual customer contracts. Telenet also notes that it has interconnection and operating agreements based on its common carrier status. In addition, Telenet alleges a lack of finality in the Commission's *Final Decision* and asserts that ambiguity exists between it and the *GTE/Telenet Merger Opinion*, 72 FCC 2d 111, leaving Telenet "at a loss to determine what the Commission intends Telenet to do." GTE Motion at 8. Telenet argues that it would be irreparably injured in the absence of a stay.

3. Pleadings in opposition to the motions for stay have been filed by the Computer and Business Equipment Manufacturers Association (CBEMA), International Business Machines Corporation (IBM), Delphi Communications Corporation (Delphi), and Computer Network Corporation (Comnet).[2] These parties essentially argue that the relief sought by petitioners is more far reaching than necessary to prevent the alleged injuries petitioners claim would result in the absence of a stay and would serve to inhibit the offering of enhanced service by new entrants as well as existing service providers. However, none of the parties opposed the grant of a limited waiver or other narrowly-drawn relief which would solely address the transitional concerns of petitioners. In addition, the North American Telephone Association (NATA) filed "observations" on the motions for stay,[3] and Telenet filed a supplement to its motion.

4. As discussed below, we conclude that the alleged uncertainties and disruptive effects of implementing the basic/enhanced dichotomy and the concomitant exclusion of enhanced services from Title II regulation can be sufficiently ameliorated by providing petitioners and all other carriers a transition period for the detariffing of their existing enhanced services. To the extent relief is sought that would subject all existing and future enhanced service providers to a general

[2] Comnet's Opposition was accompanied by a motion for leave to file out of time. That motion is hereby granted.

[3] NATA observes that in its petition for reconsideration it has asked that the Commission rule that regulated telecommunications common carriers may not provide CPE on an untariffed basis until the transitional activities and proceedings contemplated in the *Final Decision* have been concluded. NATA notes that both its petition and the Tymnet and Telenet motions "touch on the timing of unregulated carrier activities," and asks that the Commission be mindful of NATA's position in ruling on the stay requests.

stay of the *Final Decision*, we conclude that such relief should be denied.

Discussion

5. In our *Final Decision* we determined that network services provided to consumers should be classified as either basic or enhanced. Basic transmission services would be regulated under Title II while enhanced services would not. Carriers affiliated with the American Telephone and Telegraph Co. (AT&T) and General Telephone and Electronics Corp. (GTE) would be required to offer enhanced services through a separate subsidiary on a resale basis such that underlying transmission facilities are obtained pursuant to tariff. Because at the margins of the basic/enhanced boundary a relatively few enhanced services are currently offered by these carriers on a tariffed basis, a transition period of until March 1, 1982, was established in order to provide for the orderly offering of their existing enhanced services through a separate corporate entity.

6. The issue of a transition period for other carriers, which are not subject to the separate subsidiary structure[4] but currently offer some enhanced services, was not addressed. We believe that a transition period should be afforded all carriers to detariff enhanced services that are offered pursuant to effective tariffs at either the federal or state level. This will substantially minimize any disruptive effects that might otherwise arise if an abrupt change were required that would affect a carrier's customer relationships in offering existing services. Accordingly, we will on our own motion grant any carrier offering enhanced services through facilities attached to the interstate network until March 1, 1982, to detariff such services. Of course, carriers are free to detariff these services any time in the interim by withdrawing the appropriate tariffs. New enhanced services, *i.e.*, those not offered pursuant to a tariff which is in effect as of the effective date of the *Final Decision*, must be offered under the parameters of the *Final Decision*.

7. This action has the effect of granting Telenet's and Tymnet's requests insofar as they seek to defer the date by which they would have to detariff their existing enhanced service offerings.[5] Both parties suggest that a period of at least six months' duration following disposition of petitions for reconsideration would be necessary to effect an orderly transition for provision of services pursuant to individually negotiated contracts. We are according a somewhat longer transition period than requested because we believe that the public interest will best be served by employing a single, well publicized transition date.

[4] These carriers would continue to offer basic services pursuant to tariff and otherwise comply with the requirements set forth in para. 231 of the *Final Decision*.

[5] We note that Telenet could have availed itself of the previously established transition period. See *Final Decision* at para. 266.

March 1, 1982, is also the deadline for detariffing carrier-provided customer-premises equipment and for structural separation of all enhanced services provided by the Bell System and GTE Companies.

8. Having established this transition period, we now address the merits of petitioners' stay requests in light of this action. Section 1.429(k) of the Commission's Rules, 47 C.F.R. §1.429(k), provides for the issuance of a stay pending reconsideration by the Commission on a showing of good cause. In determining whether good cause has been shown, the Commission examines the four factors enumerated in *Virginia Petroleum Jobbers Association* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958) as explained in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977). *See e.g., Frequency Allocation*, 66 F.C.C. 2d 248 (1977). In *Virginia Petroleum Jobbers*, the court stated that in determining whether a stay is warranted the following factors are influential: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal? (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? (4) Where lies the public interest? 259 F. 2d at 925. The test in *Virginia Petroleum Jobbers* was slightly modified in *Holiday Tours, supra.* In *Holiday Tours*, the court stated that when the second, third and fourth factors strongly favor interim relief, a tribunal "may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." 559 F. 2d at 843.

9. *Irreparable Injury.* Telenet and Tymnet argue that they will be irreparably injured in the absence of a stay. They argue that instantaneous conversion from tariff to contract-based customer relationships would be physically impossible. Moreover, they contend that until some clarification is given the basic/enhanced definitions, they are unable to categorize some of their network services. Also cited are alleged inconsistencies between our *Telenet Merger Opinion*, 72 FCC 2d 111 (1979) and the *Final Decision*. These arguments, however, are germane to their provision of existing services. Whatever validity they may have had as support for stay is negated by the grant of a transition period as discussed above. A carrier is under no compulsion to alter its regulatory or business relationships as to any existing service until March 1, 1982. Because there is no requirement for immediate action affecting either their status as carriers or their existing services, petitioners' contentions of irreparable injury are without merit. Moreover, it is anticipated that the Commission will act on the various petitions for reconsideration filed in this proceeding well before March 1, 1982. To the extent any carrier is of the view that clarification is needed prior to taking any action to detariff an enhanced service, it is free to await Commission action on reconsideration.

10. *Harm to other parties.* The next factor to be considered is

whether other interested parties would be substantially harmed if the stay were issued. Telenet asserts that the *Final Decision* "does not identify any particular parties . . . who would benefit from the withdrawal of Title II regulation from enhanced communications services," Motion at 19. Telenet argues that the grant of the stay requested will not "necessarily" harm prospective entrants to the "enhanced services" market, because they remain free to seek certification as carriers and offer such services on a tariffed basis. *Id.* at 20. Telenet's assertion is contrary to our finding that "the absence of traditional public utility regulation of enhanced services offers . . . significant public benefits to . . . providers of basic and enhanced services and [to] consumers". *Final Decision* at para. 7. The necessity for new entrants or existing service providers to structure their offerings so as to separate their "hybrid data processing" and "hybrid communications" offerings under existing Section 64.702, 47 CFR §64.702, would not only impose a substantial burden upon them, but may well inhibit new services from being offered to the public.

11. Telenet's reliance upon *General Telephone of California*, 14 FCC 2d 170 (1968), in support of the proposition that "being subject to regulation does not, standing alone, amount to cognizable injury," Motion at 20, is unwarranted. There we stated that the GTE affiliates, which were seeking a stay, had not shown that the requirement of a Section 214 certificate "impose[d] an undue burden upon petitioners or [would] result in irreparable injury to them." *Id.* at 174. Here, however, Telenet must demonstrate that the harm to the public and other service vendors as a result of a stay will be insubstantial. Telenet has not met its burden of proof, and indeed cannot in light of the evidence compiled in this proceeding that the existing Section 64.702 results in an artificial structuring of services and inhibits the offering of a full range of services to consumers. The exclusion of enhanced services from Title II regulation would best serve the public interest by removing restrictions on the manner in which certain enhanced services are offered to consumers and by increasing the potential for greater utilization of the telecommunications network.

12. *Success on the Merits.* In its motion and supplement, Telenet argues that it is likely to prevail upon the merits on reconsideration and as evidence thereof lists a number of legal issues (Motion, at 16) which, in its view, are "substantial" or "serious." Telenet observes that the court in *Holiday Tours*, in addition to its qualification of "success on the merits" focused on the existence of a "serious legal question." It is clear from a reading of the entire opinion that the court's holding was narrow, and only slightly modified the earlier test. It is clear that an enumeration of serious, substantial or admittedly difficult legal issues to be addressed on reconsideration of a lengthy and far-ranging decision is not an acceptable substitute for a showing of likelihood of success on the merits. Telenet fails to provide either evidence or argument contrary to our ruling that enhanced services are not

common carrier communications services subject to Title II regulation, or to indicate how this determination is inconsistent with *GTE Service Corp.* v. *FCC*, 474 F. 2d 724 (2d Cir. 1973).

13. *Public Interest.* Finally, we consider whether the public interest would be served by grant of the broad stay Telenet requests. Telenet urges that "immediate decertification of existing enhanced services would be totally disruptive and chaotic as to existing services and relationships between suppliers and their customers." Motion at 22. The transition period set forth above safeguards the public interest in this regard. Telenet also argues that if we were to decide, on reconsideration, that "enhanced" services are subject once again to Title II regulation, the relationship between new entrants into the marketplace and their customers would be seriously disrupted and that failure to stay the enhanced services portion of the decision would present the Commission with a *fait accompli* on reconsideration. (Motion at 6). To the contrary, the same broad and flexible powers which enabled us to fashion the present solution to the legitimate concerns of enhanced service prodiers and their customers will enable us to adequately address any modifications that may affect services offered in the marketplace. *See ITT World Communications, Inc.* v. *Consortium Communications International*, 76 FCC 2d 15 (1980).

14. Assertions are made that the record before the Commission fails to support the findings that "deregulation" would serve the public interest. These bare assertions fall far short of demonstrating that the public interest would best be served by grant of Telenet's broad stay request. The absence of any irreparable harm, the likelihood of harm to the public and other parties if a stay is issued, and the lack of a substantial case on the merits, indicate that the public interest would be best served by a denial of petitioners' requests for stay.

15. We therefore conclude that, in establishing the transition period indicated above, we have provided the relief requested by Tymnet, and that Telenet has failed to establish the requisite showing of good cause for the issuance of the broad stay it requests.

16. One final matter to be addressed is Telenet's statement that it is at a loss as to what the Commission intends it to do. Telenet asserts that it is unclear whether the Commission intends Telenet to cease to be a carrier, whether its offering of new enhanced services must be offered through a separate subsidiary, and if so, whether this would automatically trigger immediate imposition of the separation requirements set forth in the *Final Decision*.

17. It should be stated at the outset that, under the *Final Decision*, whether Telenet remains a carrier providing communications services is a function of the types of services it offers. While Telenet's existing F.C.C. Tariff No. 1 constitutes an enhanced service under the *Final Decision*, the Commission in that decision did not prevent Telenet from providing basic services, should it so choose. However, there are obvious structural implications should Telenet choose to offer basic

services. Telenet itself notes the prohibition against the AT&T or GTE enhanced service subsidiary providing both basic and enhanced services. *See Final Decision* at para. 230.

18. Accordingly, the determination as to the role it is to play in providing various services to consumers, and the structure under which such services are provided, rests with Telenet and its corporate parent. If Telenet is to serve as the GTE enhanced service subsidiary, then it will become a resale entity providing solely unregulated enhanced services on the date it detariffs its existing enhanced service offering, which, as indicated at para. 4 above, is not to be later than March 1, 1982. Under this scenario, Telenet is free to offer new enhanced services on non-tariffed basis subject to the conditions imposed by the *GTE/Telenet Merger Opinion*, as modified,—which in some instances may be less restrictive than the separation conditions imposed by the *Final Decision* —pending further Commission action[6] *See Final Decision* at n. 109. However, if its corporate plans envisage operation as other than a resale entity, or involve the provision of basic services, then Telenet would be subject to the separate subsidiary requirements of the *Final Decision* for the provision of any new enhanced services.

19. Having considered the Motions before us, IT IS ORDERED, that the motions filed by Tymnet and Telenet ARE GRANTED to the extent set forth herein, and otherwise DENIED.[7]

FEDERAL COMMUNICATIONS COMMISSION,
WILLIAM J. TRICARICO, *Secretary.*

[6] Our release of the "Bureau Audit Report and Reevaluation of Conditions" for public comment (FCC 80-241, Released: June 11, 1980) did not imply Commission endorsement of the Bureau's proposed conditions. We expect that any remaining uncertainty or confusion Telenet may be experiencing with respect to separation requirements during the transition period will be alleviated in the near future, either by modification of the conditions in CC Docket No. 80-197, the GTE Telenet Compliance proceeding, or upon reconsideration of the *Final Decision*.

[7] A review of petitions for reconsideration filed in this proceeding indicates that the petitions of Datapoint Corporation (Datapoint) and Western Union International (WUI) incorporate stay requests. However, Section 1.44(e) of the Commission's Rules requires that any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading and any such request which is not so filed will not be considered by the Commission. Datapoint and WUI have not complied with Section 1.44(e). Moreover, these parties have not attempted to make a showing consistent with *Virginia Petroleum Jobbers* and *Holiday Tours* justifying a stay.

CONCURRING STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

IN RE: MOTIONS OF TYMNET AND TELENET FOR STAY PENDING RECONSIDERATION OF FINAL DECISION IN THE SECOND COMPUTER INQUIRY.

While I concur in the Commission's prescribing a transition period until March 1, 1982 for carrier detariffing of enhanced services, I wish to reiterate my concern that the same March 1, 1982 implementation date adopted by the *Computer Inquiry II* initial Final Decision for customer premises equipment (CPE) deregulation and for the establishment of AT&T and GTE separate subsidiaries is unrealistic in the extreme.[1] Should the Commission ultimately grant a more reasonable time frame for CPE deregulation and the establishment of AT&T and GTE separate subsidiaries, I would expect that we would accord a similar extension for carrier detariffing of enhanced services.

I also wish to record a limited concurrence in the discussion contained in paragraphs 16 through 18 of this *Memorandum Opinion and Order*. I have previously detailed my difficulties with certain aspects of the structural separation requirements and basic/enhanced service dichotomy prescribed by the Commission's *Computer Inquiry II* initial Final Decision,[2] and I have further noted the question of the compatibility of the particular structural and operational conditions proposed for the GTE-Telenet merger with those more generally outlined in *Computer Inquiry II*.[3] This *Memorandium Opinion and Order* provides a welcome interim clarification that Telenet may offer new enhanced services on a non-tariffed basis subject to the conditions prescribed by the Commission in its GTE-Telenet Merger decision, as modified—conditions which "in some instances may be less restrictive" than those prescribed by the *Computer Inquiry II* initial Final Decision—pending further Commission action. However, this interim clarification cannot take the place of the thorough review of the particular GTE-Telenet Merger conditions which is pending before the Commission in the form of the GTE-Telenet Compliance proceeding in CC Docket No. 80-197; nor should it detract from or in any way diminish the necessity for full Commission reconsideration of its initial Final Decision in *Computer Inquiry II*.

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[1] *Computer Inquiry II-Final Decision*, FCC 2d (Adopted April 7, 1980; Released May 2, 1980), 45 Fed. Reg. 31319 (May 13, 1980), Statement of Commissioner Joseph R. Fogarty Dissenting in Part, 45 Fed. Reg. 31367, 31372.

[2] *Id.*

[3] *GTE-Telenet Merger-Bureau Audit Report*, Separate Statement of Commissioner Joseph R. Fogarty, FCC 2d , (FCC 80-241, Adopted April 24, 1980; Released June 11, 1980).

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No. 81-522

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, *et al.*,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ERWIN G. KRASNOW
RAUL R. RODRIGUEZ
National Association of Broadcasters
1771 N St., N.W.
Washington, D.C. 20036
(202) 293-3560
Attorneys for Petitioner
National Association
of Broadcasters

MICHAEL S. HORNE
DONNA M. MURASKY
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioners Hubbard Broadcasting, Inc., Midwest Television, Inc., Post-Newsweek Stations, Inc., and John Blair & Company

SAMUEL MILLER
MILLER AND FIELDS
1901 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 785-2700

Attorney for Petitioner Malrite T.V. of New York, Inc.

ARTHUR B. GOODKIND
KOTEEN & BURT
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 467-5700

Attorney for Petitioner McGraw-Hill Broadcasting Company, Inc.

JAMES A. MCKENNA, JR.
ROBERT W. COLL
STEVEN A. LERMAN
DENNIS P. CORBETT
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 861-2600

Attorneys for Petitioner American Broadcasting Companies, Inc.

GEORGE VRADENBURG III
HARRY R. OLSSON, JR.
CBS INC.
51 West 52 Street
New York, New York 10019
(212) 975-4321

Attorneys for Petitioner CBS Inc.

JEROME J. SHESTACK
R. CLARK WADLOW
SCHNADER, HARRISON, SEGAL & LEWIS
1111 Nineteenth Street, N.W.
Washington, D.C. 20006
(202) 463-2900

Attorneys for Petitioner National Broadcasting Company, Inc.

J. LAURENT SCHARFF
MARK J. TAUBER
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Attorneys for Petitioner Association of Independent Television Stations, Inc.

LEE M. MITCHELL
TOM W. DAVIDSON
SIDLEY & AUSTIN
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 624-9000

Attorneys for Petitioner Field Communications Corporation

THOMAS J. DOUGHERTY
PRESTON R. PADDEN
METROMEDIA, INC.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(202) 244-5151

Attorneys for Petitioner Metromedia, Inc.

DAVID H. LLOYD
ROBERT ALAN GARRETT
ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-3600

Attorneys for Petitioner Commissioner of Baseball

PHILIP HOCHBERG
VORYS, SATER, SEYMOUR AND PEASE
1828 L Street, N.W.
Suite 1111
Washington, D.C. 20036
(202) 822-8200

Attorney for Petitioners National Basketball Association and National Hockey League

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REPLY OF PETITIONERS

This Reply addresses only the respondents' arguments that the FCC acted properly in repealing its distant signal and syndicated programming rules and in rejecting a retransmission consent requirement for certain distant signals. On these points, respondents urge this Court to deny the petition for two basic reasons. The National Cable Television Association, Inc., asserts, without citing a single authority, that because the FCC's power to regulate cable is implied under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, the rule that this Court will not infer withdrawal of an agency's jurisdiction, "absent a clearly expressed congressional intention," is inapplicable. *FAA* v. *Robertson*, 422 U.S. 255, 266 (1975). The Federal respondents, on the other hand, while urging that it is "clear that Congress intended to place no limitation on the

Commission's authority to modify or eliminate the rules . . . ," also urges that Congress, by the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (Supp. III 1979), eliminated the FCC's power to modify its rules by imposing on cable television systems a retransmission consent requirement for certain distant signals. Brief for the Federal Respondents in Opposition, p. 14. According to both sets of respondents, a retransmission consent requirement cannot be reconciled with the Copyright Act, and Congress therefore repealed by implication in the Copyright Act the FCC's previously existing authority to impose such a requirement.

These assertions are not only inconsistent with the statutory language and the legislative history of the Copyright Act, but also fly in face of heretofore unquestioned principles of statutory construction. First, Congress, when it enacted the Copyright Act, expressly and quite specifically, *retained* the authority granted under previously enacted federal statutes: "Nothing in this title annuls or limits any rights or remedies under any other federal statute." 17 U.S.C. § 301(d) (Supp. III 1979). When Congress did so, moreover, it unquestionably was aware that this Court, in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and other decisions, had construed the Communications Act to encompass FCC regulation of cable television. Second, what evidence of legislative history there is demonstrates that Congress, by its enactment of the Copyright Act, did not favor the wholesale repeal of the distant signal and syndicated programming rules that the FCC has now effected:

> "We . . . caution the Federal Communications Commission . . . not to rely upon any action of this Committee as a basis for any significant changes in the delicate balance of regulation in areas where Congress has not resolved the issue. Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as . . . increased use of imported distant signals. These matters are ones of

> communications policy and should be left to the appropriate committees in the Congress for resolution." H. Rep. No. 94-1476, 94th Cong., 2d Sess. at 89 (1976).

Admittedly, the FCC, despite the Copyright Act, has the authority to prohibit *any* secondary transmissions of distant signals by cable systems, thereby imposing, in effect, full copyright liability for such transmissions. Given that fact, it is nonsensical to ascribe to Congress any intention to strip the FCC of the power to impose a retransmission consent requirement for those very signals. Such a requirement, which would leave intact the compulsory licensing scheme and statutory copyright liability for certain signals imported by cable television systems, would, in no sense, irreconcilably conflict with the Copyright Act. What the Congress rejected in that Act was across-the-board copyright liability for cable television systems, many of which had for years retransmitted, without payment of a single penny, programming purchased in the marketplace by both local and distant broadcast stations. *See* H. Rep. No. 94-1476, 94th Cong., 2d Sess. 8 (1976). However, the decision to reject across-the-board, full copyright liability does not lead inexorably to the conclusion that Congress was opposed in each and every respect to cable's participation in the marketplace in which broadcast stations must compete.

Respondents also urge that the FCC's repeal of its rules and its refusal to impose a retransmission consent requirement should be upheld because the FCC is under no duty to insulate broadcast stations from cable competition. However, far from increasing meaningful competition between cable systems and broadcast stations, the FCC's repeal of its distant signal and syndicated programming rules and its rejection of any retransmission consent requirement further insulate cable systems from competition in the marketplace. Under the new rules, cable systems may retransmit, subject only to a noncompensatory compulsory licensing fee, programming bar-

gained and paid for by local broadcast stations in the marketplace.

Respondents fail to come to grips with the distinct nexus between the Commission's 1972 cable television rules and the congressional enactment of the Copyright Act of 1976. The legislative history of that Act clearly indicates that continuation of the syndicated program exclusivity and distant signal rules was contemplated by the Congress as being essential to the compulsory licensing scheme created by the Act.

The FCC's responsibility is to provide a climate in which *all* the people, and not merely cable subscribers, have access to quality television programming. *See, e.g., National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). It has not done so here. While the FCC's decisions will enhance programming diversity for cable subscribers, they inevitably will have an adverse impact on the vast majority of television viewers who must rely on local broadcast stations.

Respectfully submitted,

ERWIN G. KRASNOW
RAUL R. RODRIGUEZ
National Association of Broadcasters
1771 N St., N.W.
Washington, D.C. 20036
(202) 293-3560
Attorneys for Petitioner
National Association
of Broadcasters

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